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OPTIONS TO IMPROVE THE TRADE REMEDY LAWS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRADE

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

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OPTIONS TO IMPROVE THE TRADE REMEDY LAWS

TUESDAY, APRIL 19, 1983

House of Representatives,
Committee on Ways and Means,
Subcommittee on Trade,
Washington, D.C.

The subcommittee met at 9:40 a.m., pursuant to notice, in room B-318, Rayburn House Office Building, Hon. Sam M. Gibbons (chairman of the subcommittee) presiding.

Chairman Gibbons. This morning, we are going to concentrate on unfair trade laws, such as the antidumping and countervailing duty laws. We have with us Mr. Gary Horlick, who is the Deputy Assistant Secretary for Import Administration in the Commerce Department, and Mr. Charles Ervin who is the Director of Operations for the International Trade Commission.

Mr. Horlick, you go right ahead.

STATEMENT OF GARY N. HORLICK, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. Horlick. Thank you, Mr. Chairman.

Rather than read my prepared statement, what I would like to do is run briefly through the procedures and make a few additional points.

Chairman Gibbons. All right.

Mr. Horlick. First, I would like to summarize the procedures whereby the Department of Commerce handles these provisions to try to set a framework. Basically, antidumping and countervailing duty investigations are handled the same way. We receive a petition, and we have 20 days in which to decide whether to initiate the investigation or not.

We almost always initiate the investigation. The congressionally mandated standard for acceptance of a petition is very low and the only petitions we have rejected have been where the information was extremely defective or where the information in the petition was contradictory within itself. There have not been many cases of that nature.

In particular, with some small petitioners, we sit down with them, hold their hand, explain what is necessary, help them in any way possible. I personally don't feel that the petition process is an obstacle for small petitioners, and the proof is that we have had a lot of small petitioners file petitions.

After we initiate, we send out a questionnaire to the foreign respondent.

The dumping questionnaire is a pretty standard questionnaire, so we can get it out fairly quickly. You are asking the same questions in every case: What are your prices, costs, and so on.

The tough ones are the countervailing duty questionnaires. Every one has to be hand-tailored depending on what subsidies are alleged. You simply can't send out a questionnaire saying "tell us about your subsidies." We look at the petition and try to extract questions from the petition and any other information we have about the foreign country.

Once we have sent out the questionnaire, the responsibility is on the foreign respondent to come up with information. If they don't reply satisfactorily to our questionnaire, we use the best information available, which is typically the information in the petition. We have used that fairly frequently, especially on preliminary determinations. We get a lot of squawks about the high margins that result, but I think it is a sound administrative principle that if they are not going to cooperate with you, you need some sort of stick, and that is how it works.

With a lot of the countervailing duty questionnaires in particular it has become a back and forth process, whereby we ask a question and it gets a response that leads to more questions, and we keep going back and forth which makes things rather complicated given the time limits.

Once we get the questionnaire response, we sit down and analyze it to see what they are saying and to prepare a preliminary determination. In theory we have done all of this without any input from the parties after the petition, but in practice what you get is everyone writing us letters suggesting that we ask that question or explaining why they gave that answer, and calling up and asking for meetings, et cetera.

After our preliminary determination, and sometimes before, if there is time, we go off and verify the questionnaire response. If the foreigners have given us information, we go off and look at the books and records of the companies and government, as relevant, to make sure that what they gave us matches.

It is done on a random basis. We literally send people over to the factory or the government ministry and say, "We want to see that invoice," without warning them in advance, and making sure that the information on that invoice matches up with what they have told us in their questionnaire response. Again, in theory this is something that we do on our own, but in fact you have both sides arguing over what we should ask for, et cetera, et cetera.

We then have a hearing with pre- and posthearing briefs. It is on the record with a transcript. Then we issue a final determination. Our final determination has to be supported by substantial evidence on the record, that is the standard for judicial review. So, basically, the responsibility is not on one party or the other when it gets to the final determination, it is on the Government to have come up with enough information.

The point I want to emphasize here is that in theory, the original theory, this is an investigation by the Government, and it is not an adversary proceeding. Again in theory, the parties are supposed to trust us. That is not the American way, so what it has turned into is a quasi-judicial proceeding with both sides fighting it out at every point, and I think personally that accounts for a lot of the expense and complexity.

I am a lawyer as you are, Mr. Chairman, and some of the other members here. You are supposed to zealously represent your client. If you have five shots at an argument, you are going to argue it five times. Frankly, I don't blame the lawyers for that, they are doing their job. It is up to us—us includes certainly the people administering the laws and, frankly, the Congress and the courts—to try to keep that to an absolute minimum consistent with due process. It is difficult to do typically.

I have had times where I have told people, "Look, I am tired of listening to you," and they go to their Congressman or one of my bosses and say, "He won't listen to us." Then you sit down and you listen to him. Listening to him costs them money, not me.

There are two ways that this shows up, as I said. The first is how many opportunities you get to argue with us. When the petition is filed, often both sides will come in and argue that you should or shouldn't accept the petition, although in theory we just look at it and decide. When a questionnaire is being drafted, we typically let petitioners see what we are doing with the questionnaire, and they will argue that we should ask other questions.

Once the questionnaire is sent out, the respondent will argue, "Well, you shouldn't have asked that question." When we get the questionnaire response back and both sides have seen it, we have an argument. This goes on like that. If people want to put in the time, they are going to do that.

The other aspect goes to the number of different things you can argue about.

An example is the antidumping law. Basically, in an antidumping calculation you compare the price of export as it leaves the factory and the price for the domestic market as it leaves the factory. Of course, no one ever sells on that basis so what you do is you take the price it actually sold for in the United States and take out the transportation, customs fees, brokerage fees, sales expenses, and on and on, and do the same for the item sold in the domestic market. That gives you a lot of little points for everyone to argue about.

Arguably you would be better off not allowing any adjustments, but it would be terribly unfair to one side or the other. So there is a real balancing to do between how many things you want people to be able to argue about and how fair you are being. There is a balancing there which I feel is a congressional prerogative or responsibility.

In considering suggestions for reform of these laws, I would suggest that the balance to look for is a trade-off. You can give either side more and more rights, but if you have 20 chances to challenge us in court, it may be meaningless if you can't afford to do it. You make the thing so expensive that all these procedural rights cease to be worthwhile to anyone except the really big company.

The example I give is the large number of large steel cases last year where there was a lot of money at stake. To be honest the law worked pretty well, with few exceptions. Procedurally it worked pretty well because both sides had enough money to fight out every issue. We went through nearly every section of the antidumping and countervailing duty laws because both sides could afford to fight out every point, and because of the extraordinary nature of the cases, the Government could put in the resources to handle all the fights also. It was messy, but it worked.

My worry is more the routine case where one side can't afford to fight out every point, and the other side can. You can bleed the opponent, and I see examples that look like it.

Those are, in essence, the procedures and why I think they are too expensive.

I have read over the testimony which has been presented to the committee and I have seen a number of concerns appearing.

First, obviously, a lot of people consider the whole procedure too expensive. My estimate, based on conversations with people who practice law in this area is that the cheapest and simplest antidumping case for a petitioner is now $100,000 in legal fees.

Some people do it on their own, though rarely. We have had a couple cases where people have done it on their own and won. I go back to my original point. Basically, we are supposed to do the investigation, not them. If they file a petition—on which we will help them— we will go off and investigate, and if there is dumping, we will find it.

Understandably, and if I were in their shoes, I would feel the same, I would want to be looking over the Government's shoulder to make sure that they were finding every single bit of subsidy or dumping.

I think, in large part because of these hearings, a lot of groups have started to focus on how the procedural aspects of the law have increased the expense of these cases and made the law, in essence, unavailable to small business.

So I think that these hearings have already had a helpful effect on that count. At the same time, you don't want to simplify them so much that you lose the due process that Congress was concerned to obtain when it amended the law in 1979.

A second concern is that many U.S. businesses have appeared before you or will appear before you to tell you that it is too hard to win a case. Obviously, I have some sympathy with that since I frequently represented domestic clients when I was a lawyer. But I think there is a balance here that Congress intended which I find well put in the thoughful statement that the U.S. Chamber of Commerce filed with you last month and I quote:

> Effective enforcement of sound trade laws provides the U.S. firms and workers with remedies against foreign practices which distort markets and unfairly deprive U.S. firms of sales. However, laws which set low standards of proof, bias investigations in favor of restraints on trade or offer indefinite relief without prospect of industry action to restore competitiveness unduly burden other U.S. industries, weaken the economy, and lower living standards. Poor design and implementation of U.S. trade laws could erode the competitiveness of the economy, stifle growth and reduce employment.

As President Reagan put it in a speech last month, "The cost of protectionism for one group of workers is always passed on to another group down the line. Once such legislation is passed, every other industry would be a target for foreign retaliation. We would buy less from our partners, and they would buy less from us. The world economic pie would shrink."

I think there is a legitimate concern about using procedural points, or what appear to be minor technical points in these laws to obtain import restraints or to obstruct import restraints which don't reflect the underlying congressional policy of offsetting completely unfair trade, but allowing fair trade as long as it does not cause serious injury to the U.S. industry.

I have absolutely no quarrel with offsetting every smidgin of unfair trade and I have tried to do so to the best of my ability. Any time you overdo that, you are distorting the marketplace in the other direction, and that is going to cost someone in the United States money. It costs consumers, and it costs other producers. We have had a lot of complaints from people who buy imports which have been found to be dumped or subsidized, who come and complain that their costs have gone up and that reduces their competitiveness.

A third aspect is that many witnesses have told you that we make the wrong decisions. Obviously, the people who have disagreed with our decisions are more likely to seek you out to complain than the people who are happy with us. Nevertheless, I do point out to these people that Congress in 1979 foresaw that the administration would make wrong decisions, to err is human, and provided for remedy in the courts. People have taken advantage of that.

There is a procedure for judicial review. People have used it frequently. A lot of the people who are complaining to you are in litigation on the same matters. I am not happy about being a defendant in 80 or 90 cases, but I think that is how the system is supposed to work.

I think I should be pleased with the tone of the criticism. As I am sure all of you remember, in 1979 the cricitism was that we were making the wrong decisions for political reasons. Now it is that we are inept or incompetent, which is progress.

The fourth claim is that trade laws don't provide proper relief for U.S. industry against many foreign practices. I will give you an obvious example. The biggest foreign subsidy I can imagine is import protection overseas, high tariff barriers, and we do not find that a countervailable subsidy. Under the GATT rules it isn't.

If the Congress wishes to change that, it is obviously a fairly complicated matter because, quite candidly, we protect a lot of industries. We have import barriers. We have high tariffs on some things. I think it would be a very difficult thing to say that we should just go off and countervail tariff barriers, unless we are willing to have other people do it to us. I can think of some foreign countries that would jump at the opportunity.

I should note that under the countervailing duty law in the last year alone, we have countervailed such classic industrial policy practices as R&D subsidies, credit rationing, and even government military procurement at what might have been inflated prices.

I don't think that we have been reluctant to find out what is a subsidy and what isn't. People may disagree with our findings, but we haven't exactly been shy about it. We have attracted a lot of unfavorable comment overseas, which is, I think, a good measure that we must be doing something right sometime.

I would point out, a lot of the things I have heard about the trade laws have reflected structural changes in the U.S. economy, specifically interdependent production. People import things, make things out of them, export them, et cetera. A lot of petitioners do not want to bring these cases because they are importers as well. I would not want to cite specific examples, but there is one item where a lot of people said, "Why isn't something being done?" Well, two of the largest U.S. producers didn't want anything done because they were importing the things also.

A lot of the smoke reflects specific companies that can't get their industry together to bring a case, not just a dumping or countervail case but any form of import relief. As companies have become multinational and have gone out into the world market, it progressively tempers their desire to seek import protection. I am not quite sure what the remedy is.

There is an underlying problem of protecting workers who lose jobs because of corporate decisions, and I am not ignoring that cost. I might add that unions are permitted to file petitions under these laws, even formally unorganized groups of workers.

I would note that section 301 does permit a tax on some of the practices that you can't reach under the countervailing duty law. One very important aspect of the countervailing duty law is that a countervailing duty law can't do anything about stuff which isn't imported here.

For a lot of industries, the world is the market. If you don't have worldscale production, you are not going to be competitive anywhere. The fact that a foreign country is killing us in foreign markets hurts our industry and our workers even though a countervailing duty law can't touch the foreign merchandise. Section 301 nominally should be able to reach that, or one hopes it can.

Clearly all these are issues that the Congress is going to want to look into, and I don't want to push the point too far. I would add one caution about the need to tread warily and maintain a balance, not only for the reasons I mentioned. The one certain golden rule I am convinced of in international trade is that anything we do to others will be done to us.

As many of you remember, in 1980 the European Community was very interested in imposing countervailing duties on our textile imports which were benefitting from the low value of the dollar, because of our cheap natural gas. We still have price controls on natural gas. We have had a number of petitions saying that cheap natural gas in foreign countries should be considered a subsidy in the United States.

There are a lot of things we do in the United States, which judging from our past precedents, would be countervailed. I can give you examples. The steel industry benefits from a stretchout for environmental controls that other industries don't get. Without wishing to give advisory opinions, some might claim that it is a countervailable subsidy. Certainly the steel industry would so claim that if someone else got it. The same is true of the special carve outs for some industries in the safe harbor leasing phase out of the 1982 TEFRA.

Many of our industries complain about Japanese subsidization of research and development. As I said, we have frequently countervailed R&D grants. But I might point out that foreigners have frequently claimed that we have benefitted substantially from government—especially military—R&D money that helped build, the foreigners claim, such important industries as semiconductors, computers, and commercial aircraft.

Some of the recent allegations we have received of foreign subsidies include such common U.S. practices as supplying water for irrigation of agriculture, and helping manufacturers with defense contracts by awarding them on a cost-plus basis.

Without pushing the point, we have either held or implied that we would countervail such U.S. practices as some agricultural export promotion services, and some tax practices which favor exporters. You can put the names on them yourself for the U.S. equivalents.

This is not idle speculation. I am not talking about the mere possibility of retaliation. Other countries have these same laws. In the last 2 years, the EC has had 16 antidumping cases against the United States and Canada has had 12. In fact, until the steel investigations were filed last year, the EC had a more active docket than we did.

Following the Tokyo Round where a lot of countries agreed to international rules, a lot of the countries have implemented these rules. So it is not just Canada and the EC. We get requests for information from foreign countries that have just enacted these laws. Now it is not just the usual—Canada and the EC—but Spain, Pakistan, India, Japan has just used its law for the first time, Chile, the Philippines. This is spreading all over the world.

My brethren in the bar will be pleased to hear that this area is becoming more judicialized also. The EC now has four cases in the courts, in their own court system. Indeed, I noticed just a few days ago the European Community, at the instigation of the French, has now proposed its own section 301. It is even more sweeping than ours. I leave to the committee members' imagination how many U.S. soybeans or computers could get through French customs at Poitiers, which is already jammed up.

I will simply close my half of this by saying that we have no hesitation in going after unfair foreign trade practices. People will disagree with us about what some of them are.

In applying the current law, I am convinced that there are a lot of changes which need to be made. Indeed, this committee recognized in 1979 that there would be a need for a shakedown period and then technical amendments. Obviously, we are delighted to work with the committee and staff on those.

I tread warily simply because there is a delicate balance here which Congress sought in 1979, and I am very wary of upsetting that balance in a way that would tilt the procedures on one side or the other.

Thank you very much.

[The prepared statement follows:]

Statement of Gary N. Horlick, Deputy Assistant Secretary for Import Administration, Department of Commerce

I am pleased to have this opportunity to testify about how to reduce the time and expense involved in processing antidumping and countervailing duty proceedings, thereby ensuring U.S. business and labor access to trade remedies. There are two major points I would like to make.

First, recently there has been growing attention to different types of programs used by foreign governments that are alleged to be subsidies. Some claim that the countervailing duty law cannot handle these practices. This claim is unfounded. In 1982 Import Administration not only handled its largest caseload ever (meeting all statutory deadlines for the first time in history), it also coped with some of the most complicated and important issues ever addressed. As a result of the steel countervailing duty cases, interested parties (domestic and foreign) and the trade bar now know the department's position on valuation of grants to specific enterprises or industries, grants to cover operating losses, preferential loans and loan guarantees to both creditworthy and uncreditworthy companies, equity infusions, and research and development loans and grants. Another prime example of expansion into areas not previously addressed occurred in the Canadian subway car case, which involved an export credit subsidy in a very complex business transaction. To value the subsidy in a very complex business transaction. To value the subsidy, Import Administration, assisted by outside investment bankers and financial analysts, used a sophisticated options pricing model.

These proceedings, and many more, I could mention, demonstrate that Import Administration directly addresses novel potential subsidy practices, carefully analyzes the programs, and where subsidies are found to exist, values them and imposes the appropriate remedial duty.

One note of caution is in order, though. The countervailing duty law is the appropriate law to use to counter many of these foreign government practices that are alleged to be subsidies. (The Canadian railcar case I previously mentioned is a good example of how the law can cover certain practices never before addressed). However, the countervailing duty law is not, nor should it be, a cure-all. It would be a mistake to think that the countervailing duty law can be stretched to cover all foreign practices which help their industries, including import protection, loose antitrust rules, and third-country-market trade problems. This is not to say that these practices are fair and ought not to be addressed, but rather that they are not appropriately addressed under the countervailing duty law.

The second area of major concern is the complexity and expense of the antidumping and countervailing duty laws. Most of you, and anyone who has pursued or defended allegation of dumping, are aware of the numerous, detailed, and complicated rules on adjustments in antidumping calculations.

You are also aware of the detailed and painstaking (indeed often painful) process of selecting a market surrogate in proceedings involving state-controlled economies. These areas, and many others, provide literally hundreds of instances in each proceeding in which Import Administration must make a decision. Thus, there are hundreds of potential sources of dispute from petitioner, respondent, and often both. As a result, a normal antidumping case costs a minimum of $100,000.

We are studying ways to provide less costly, more certain relief. Our hope is to identify areas where we could simplify procedures. Of course, as a result of simplification, outside legal fees would decline and the fiction that margins can be calculated to the third decimal place would be laid to rest. However, neither of those events, in my opinion, would dim the luster of less costly, more timely relief.

Another significant contribution to the high cost of proceedings is interlocutory judicial review. The law as now drafted provides that virtually all preliminary decisions by ITA or the ITC are subject to such review. Given the short statutory deadlines, few—if any—interlocutory reviews are concluded before they are mooted by superceding final determinations.

Most merely waste private and government resources and add greatly to the costs of these proceedings. Eliminating or drastically reducing interlocutory review would not mean leaving the administering authorities unbridled discretion. Judicial review is (and should remain) available concerning all aspects of our and the ITC's final determinations.

A great deal of thought went into the revisions of the antidumping and countervailing duty laws in 1979. As with any effort of this magnitude, though, certain problems have become apparent. We will continue our efforts to resolve these problems through revision of our administrative procedures.

Chairman GIBBONS. Thank you very much, Mr. Horlick. I think we will ask questions of you before we go to the International Trade Commission, because I don't want to get the two agencies mixed together.

I appreciate your testimony and I will read it thoroughly, and perhaps I will have some questions in writing. I want to say that I want to cooperate with you and the administration in working through this matter. As I have said in other meetings, and I will repeat it, when we opened these hearings it was a rather broad overview of the trade laws.

I would like, not for arbitrariness but for skill in working with the laws and to concentrate people's attention on the problems in this year, to try to restrict our legislative activity in the House and the Senate to what we call or have identified generally as unfair trade practices, dumping, and subsidies. I want to work with you and to work with the rest of the administration and the ITC in trying to come up with something, No. 1, that is in compliance with the GATT; No. 2, does not lose its transparency, maybe even perfects its transparency; and, No. 3, tries to reduce the time, the cost and the uncertainty.

I have set aside the unfair trade practices of dumping and subsidies because they have a different connotation from all of the other practices, such as section 201 actions. I think if we could do a good job on unfair trade practices, working cooperatively together, we will have gone a long way in trying to remove some of the legitimate complaints that this committee constantly hears.

What I say is not a criticism of you, your agency, or anyone else, I want to make that clear at the beginning. I realize that we made massive changes in 1979. We had hearings in 1981, but it was really too soon then to make a judgment, and that is the reason why we have come back today.

Now let me ask you, have you anywhere a list or is it in your testimony of all the cases you have had and the outcome of them.

Mr. HORLICK. I can supply that for the record. It is in the computer.

Chairman GIBBONS. I would like to have a printout of that, if you would, and we will put in the record.

[Information referred to follows:]

COUNTERVAILING DUTY INVESTIGATIONS INITIATED SINCE JAN. 1, 1982

Product	Preliminary injury		DOC preliminary		DOC final		Final injury		Order (O)/ Suspended (S)/ Terminated (T)	Major issues
	A	N	A	N	A	N	A	N		
Tuna from the Philippines	NR	NR								None yet.
Pork rind pellets from Mexico	NR	NR								None yet.
Portland hydraulic cement from Mexico.	NR	NR								None yet.
Galvanized steel wire strand from South Africa.	NR	NR	A						S	(1) Should DOC monitor prices as part of a suspension agreement? (2) Should the exporter be required to forgo subsidies on all exports, not just those to the United States? (3) Should an offset be allowed for payments into the Iron and Steel Promotion Scheme by primary producers?
Carbon black from Mexico	NR	NR	A							(1) Preferential financing. (2) Preferential prices on petroleum products and electricity. (3) Dual currency exchange rate system. (4) Government equity. (5) Preferential tax incentives. (6) Import duty rebates. (7) Regional development benefits. (8) Exemption from revenue tax on raw materials and energy.
Fresh asparagus from Mexico	NR	NR		N		N				(1) Preferential financing. (2) Tax credit certificates. (3) Import duty reductions or exemptions. (4) Investment credits or accelerated depreciation for firms in the border area. (5) Government construction and operation of irrigation facilities to agricultural sector. (6) Provision of water from irrigation facilities to agricultural sector at lower rates than those set industrial or residential users.
Anhydrous and aqua ammonia from Mexico.	NR	NR	A							(1) Preferential pricing of natural gas. (2) Capital contributions to PEMEX. (3) Preferential export taxes on petrochemicals. (4) Tax credit certificates. (5) Exemption from mandatory currency exchange law. (6) Preferential financing. (7) Preferential state tax incentives. (8) Import duty rebates on exemptions. (9) Regional benefits for basic petrochemical products.
Automated fare collection equipment from France.		N								None.
Softwood lumber products from Canada.	A			N						(1) Is administrative pricing of a natural resource a subsidy? (2) Interpretation of "generally available," "preferential pricing," and "assumption of cost."
Stainless steel sheet, strip, and plate from the United Kingdom.	A		A		A					(1) Uncreditworthiness. (2) Benchmark for loans. (3) Grants to eliminate redundant facilities. (4) Allocation of grants for closure and retiring assets.
Carbon steel pipe and tube from S. Africa.	NR	NR	A							(1) Export incentives. (2) Grants. (3) Preferential freight rates. (4) Preferential labor rates. (5) Export financing.
Wool from Argentina	NR	NR	A		A				O	Export tax offset.
Industrial nitrocellulose from France.	A			N	A					(1) Transfer of Government owned property. (2) Military sales alleged to cross subsidize commercial sales.

Iron-metal construction castings from Mexico.	NR	NR	A	A		O	(1) Dual exchange rate. (2) Preferential housing alleged.
Steel rails from France	A					T	None.
Steel rails from the FRG	A					T	Do.
Steel rails from Luembourg	A					T	Do.
Steel rails from United Kingdom	A					T	Do.
Yarns of polypropylene fibers and Mexico.	NR	NR	A	A		O	Are certain tax benefits generally available?
Turboprop transport aircraft from Brazil.		N					None.
Roses and other cut flowers from Colombia.	NR	NR	A			S	(1) Was "CAT" export payment linked to the indirect tax incidence of the product. (2) Did Government-managed air freignt rate floors confer a subsidy. (3) Was there a dual exchange rate.
Tool steel from Brazil	A		A			S	(1) Offsetting export tax. (2) Frequency of vertification.
Fireplace mesh panels from Taiwan	A		A		N		Preferential labor rates alleged.
Frozen concentrated orange juice from Brazil.	A		A	A		S	(1) Should export taxes imposed by GOB which are linked to minimum price schemes be allowed as an offset to programs under investigation. (2) GOB alleged that existing export taxes are more than enough to compensate for any subsidy bestowed as calculated by GOB and therefore no additional export tax is required in a suspension agreement. (3) What is the proper benchmark to be applied to a preferential program that has no comparable commercially available terms.
Litharge, red lead, and lead stabilizers from Mexico.	NR	NR	A	A		O	(1) Government pricing of natural resource. (2) Benchmark interest rate.
Pectin from Mexico	NR	NR	A	A		S	Can business data be exempted from disclosure as "foreign government information" if submitted through government?
Polypropylene film from Mexico	NR	NR	A	A		S	Benchmark for loan.
Railcars from Canada	A		A	A		T	Petitioner's standing as a manufacturer, when it assembles parts some of which are imported. (2) Should amount of CVD only account for parts of merchandise under investigation actually imported. (3) Dates of sale of importation in export credit financing transaction. (4) Methodology for valuing a line of credit at preferential rates which may not be used in its entirety. (5) Basis for establishing preference when buyers creditworthiness is critical to importation.
Cotton sheeting and sateen from Peru.	NR	NR	A	A		O	(1) Export payment. (2) Preferential financing.
Cotton yarn from Peru	NR	NR	A	A		O	(1) Export payment. (2) Preferential financing.
Certain stainless steel products from Brazil.	A		A			S	(1) Offsetting export tax. (2) Preferential loans.
Steel wire rope from S. Africa	NR	NR	A			S	(1) Equity infusions. (2) Preferential rail and ocean freight rates. (3) Preferential financing. (4) Export incentives.

COUNTERVAILING DUTY INVESTIGATIONS INITIATED SINCE JAN. 1, 1982—Continued

Product	Preliminary injury		DOC preliminary		DOC final		Final injury		Order (O)/ Suspended (S)/ Terminated (T)	Major issues
	A	N	A	N	A	N	A	N		
Deformed steel bars from S. Africa	NR	NR	A		A				O	(1) Equity infusions. (2) Preferential freight rates. (3) Preferential financing. (4) Export incentives.
Steel products from Korea	A		A		A		A		O	(1) Proper benchmark to use for preferential and commercial loans. (2) How to calculate benefits to company which did not ship during period of investigation but had begun to do so afterward. (3) Whether a war reparations loan was a subsidy. (4) Preferential export financing. (5) Tax incentives for exporters, steel producers and for government-owned firms. (6) Preferential utility rates and port charges. (7) Deferred import duties. (8) Tax incentives in Free Trade Zone. (9) Equity participation. (10) Upstream subsidization.
Carbon steel pipes and tubes from Brazil.	A		A						S	(1) Upstream subsidization. (2) Benchmark for loans.
Carbon steel pipes and tubes from France.	A			N					T	Preferential financing.
Carbon steel pipes and tubes from the FRG.	A			N					T	(1) Preferential loans. (2) Grants.
Carbon steel pipes and tubes from Italy.		N								None.
Toy balloons and playballs from Mexico.	NR	NR	A		A				O	(1) Injury test for Mexican duty-free goods? (2) Preferential financing.
Stainless steel products from Spain	A		A		A		A		O	(1) Indirect tax rebate. (2) Uncreditworthiness. (3) Capital infusions. (4) Critical circumstances alleged.
Steel products from Spain	A		A		A		A		O	(1) Indirect tax rebate. (2) Equity participation. (3) Uncreditworthiness.
Potassium permanganate from Spain.	A			N	A			N		Was export payment linked to indirect tax incidence?
Prestressed concrete steel wire strand from Brazil.	A		A		A			N	S	(1) General availability of certain programs. (2) Benchmark rate for loans.
Prestressed concrete steel wire strand from France.	A		A		A			N		(1) Preferential financing. (2) Grants (3) Industry-specific R&D.
Carbon steel wire rod from Argentina.	NR	NR	A						S	Overrebate of indirect taxes.

Carbon steel wire rod from Belgium.	A		A	A			N	T	(1) Capital grants. (2) Exemptions from tax. (3) Loans to uncreditworthy companies. (4) Government equity participation. (5) Preferential loans. (6) Assumption of financing costs. (7) Retraining assistance. (8) Government loss coverage.
Carbon steel wire rod from Brazil	A		A					S	(1) Benchmark for loans. (2) Critical circumstances alleged.
Carbon steel wire rod from France	A		A	A		A		T	(1) Preferential financing. (2) Grants (3) Industry-specific R&D.
Carbon steel wire rod from S. Africa.	NR	NR	A	A				O	(1) Preferential freight rates. (2) Grants. (3) Preferential labor rates. (4) Export financing. (5) Export incentives.
Steel wire nails from Korea	A		A		N				(1) Upstream subsidies. (2) Benchmark for loans.
Steel products from Belgium	A		A	A		A		T	(1) Grants. (2) Favorable loan guarantees. (3) Exemptions from tax. (4) Loans to uncreditworthy companies. (5) Equity participation. (6) Assumption of financing costs. (7) Preferential loans. (8) Funds for loss coverage. (9) Were coal subsidies passed downstream? (10) Critical circumstance allegation.
Steel products from France	A		A	A		A		T	(1) Preferential financing. (2) Equity infusions. (3) Coverage of operating expenses. (4) Industry-specific R&D. (5) Were coal subsidies passed downstream? (6) Critical circumstance allegation.
Steel products from the FRG	A		A	A		A		T	(1) Regional tax incentives. (2) Grants. (3) Preferential loans. (4) Interest rate rebates. (5) Industry-specific R&D. (6) Favorable loan guarantees. (7) Were coal subsidies passed downstream? (8) Critical circumstance allegation.
Steel products from Italy	A		A	A		A		T	(1) Preferential recapitalization & debt conversion. (2) Grants. (3) Preferential loans. (4) Exemption from social security taxes. (5) Preferential rail rates. (6) Interest rebates. (7) Were coal subsidies passed downstream? (8) Critical circumstances allegation.
Steel products from Luxembourg	A		A	A		A		T	(1) Grants. (2) Interest rebates. (3) Were coal subsidies passed downstream? (4) Critical circumstances allegation.
Steel products from the Netherlands.	A		A		N			T	(1) Grants for designated projects. (2) (3) Were coal subsidies passed downstream? (4) Critical circumstances allegation.
Steel products from the United Kingdom.	A		A	A		A		T	(1) Equity infusions. (2) Preferential loans. (3) Regional development grants. (4) Interest rebates. (5) Grants. (6) Preferential rail rates. (7) Loans to uncreditworthy companies. (8) Were coal subsidies passed downstream? (9) Critical Circumstance allegation.
Steel products from S. Africa	NR	NR	A	A				O	(1) Preferential freight rates. (2) Grants. (3) Preferential labor rates. (4) Export financing. (5) Export incentives.
Steel products from Brazil	A		A					S	(1) Export financing. (2) Was report rebate linked to indirect taxes?

ANTIDUMPING INVESTIGATIONS INITIATED SINCE JAN. 1, 1982

Product	Preliminary injury		DOC preliminary		DOC final		Final injury		Order (0)/ Suspended (S)/ Terminated (T)	Major issues
	A	N	A	N	A	N	A	N		
Chloropicrin from the PRC										None yet.
Thin sheet glass from Belgium		N								None.
Thin sheet glass from the FRG		N								Do.
Thin sheet glass from Switzerland		N								Do.
Potassium permanganate from Spain.	A									None yet.
Potassium permanganate from the PRC.	A									Do.
Potatoes from Canada	A									(1) Below-cost sales alleged. (2) Large number of producers.
Carbon steel plate from Brazil	A									Below-cost sales alleged.
Hot-rolled carbon steel sheet from Brazil.	A									Do.
Tapered journal roller bearings from the FRG.										None yet.
Tapered journal roller bearings from Italy.										Do.
Tapered journal roller bearings from Japan.										Do.
Lightweight polyester filament fabric from Japan.	A									(1) Below-cost sales alleged. (2) Are U.S. and home market [HM] merchandise "such or similar"? (3) Should dumping comparisons include sales to related firms if at arms length?
Lightweight polyester filament fabric from Korea.	A									(1) Below-cost sales alleged. (2) Are U.S. and HM merchandise "such or similar"?
Carton closing staples and staple machines from Sweden.	A									Should there be a level of trade adjustment?
Canned mushrooms from the PRC	A	A								What market economy should be used as surrogate?
Carbon steel wire rod from Trinidad and Tobago.	A	A								No "postsale" warehousing adjustment when stock sometimes used to fill general orders.

Carbon steel wire rod from Brazil	A	A					(1) Because of the relatively small number of U.S. sales, foreign market value was calculated for each month in which a U.S. sale occurred rather than using a weighted average over the entire period of investigation. (2) Circumstance of sale adjustment not allowed for export tax imposed because of CVD suspension agreement. (3) Warranty service, bad debt, and technical services to allowed because they did not bear a direct relationship to sales investigated. (4) Level of trade difference not allowed because differences in prices were not demonstrated. (5) Critical circumstances found.
							Critical circumstance alleged.
Steel wire rope from Korea	A			N			None.
Bicycles from Korea		N					What U.S. and HM merchandise are "such or similar"?
Bicycles from Taiwan	A	A					(1) Are U.S. and HM "such or similar"? (2) Is level of trade ustified? (30 Adjustment alleged for advertising and technical services.
Portland hydraulic cement from Australia.	A	A					Are U.S. and HM merchandise "such or similar"?
Portland hydraulic cement from Japan.	A	A					None.
Melamine from Brazil		N				T	Do.
Steel rails from France	A					T	Do.
Steel rails from the FRG	A					T	Do.
Steel rails from the United Kingdom.	A						
Shop towels of cotton from the PRC.	A		A				Is the PRC state controlled? Since IA could not find a market economy country whose economic development was comparable to PRC and which was willing to cooperate, what surrogate for market value should be used?
High-capacity pagers from Japan	A		A				(1) Can the pagers sold in the Japanese market, which are alleged to be substantially more expensive to produce, be compared to the pagers sold in the U.S. market? If so, should adjustments for such differences also include adjustments for profit? (2) Should profits resulting from intercompany transactions be accounted for in the cost adjustments for the differences in merchandise? (3) Will IA consider research and development expenses related to the differences in merchandise? (4) Can the display pager be considered similar merchandise and compared to tone-only pagers?
Greige polyester/cotton printcloth from the PRC.	A		A				Is the PRC state controlled?
							None yet.
Tool steel from the FRG	A		A				Allocation of R&D, G&A, and selling expenses.
Industrial nitrocellulose from France.	A			N	A		
Stainless steel sheet and strip from France.	A		A		A		(1) Should Imputed Interest on Value Added Tax be allowed as a circumstance of sale adjustment? (2) What merchandise is "similar"? (3) Should there be an adjustment for differences in level of trade?

ANTIDUMPING INVESTIGATIONS INITIATED SINCE JAN. 1, 1982—Continued

Product	Preliminary injury		DOC preliminary		DOC final		Final injury		Order (O)/ Suspended (S)/ Terminated (T)	Major issues
	A	N	A	N	A	N	A	N		
Bicycle tires and tubes from Taiwan.	A		A			N				Allegation that HM sales to OEM's were a fictitious market.
Frozen french fried potatoes from Canada.		N								None.
Stainless steel sheet and strip from the FRG.	A		A							None yet.
Sodium nitrate from Chile	A		A		A			N		(1) Should IA determine different margins for industrial grade Sodium Nitrate (98% pure) and for agricultural grade Sodium Nitrate? (2) Should ITA take into account the major devaluation in Chile on Apr. 21, 1983?
Chlorine from Canada		N								None.
Prestressed concrete steel wire strand from the United Kingdom.	A		A		A			N		Do.
Carbon steel wire rod from Venezuela.	A		A		A				S	Do.
Steel pipes and tubes from Japan	A		A		A		A		O	(1) Adjustments for U.S. credit expense and quantity differences. (2) Alleged differences in merchandise.
Steel products from Belgium	A		A						T	(1) What is "similar" merchandise? (2) Should grants be subtracted from production costs to avoid double counting? (3) Below-cost sales allegations. (4) Were claims for testing expense, warehousing, and technical services directly related to the sales investigation? (5) Critical circumstances allegation.
Steel products from France	A		A						T	(1) What is "similar" merchandise? (2) Should grants be subtracted from production costs to avoid double counting? (3) Rejection of commission to related party. (4) Were cost and depreciation differences related to differences in physical characteristics? (5) Below-cost allegation. (6) Critical circumstance allegation.
Steel products from the FRG	A		A						T	(1) What is "similar merchandise? (2) Should grants be subtracted from production costs to avoid double counting? (3) Below-cost sales allegation. (4) Were claims for differences in merchandise based on lower HM yield and additional finishing directly related to differences in physical characteristics? (5) Were claims for technical services, R&D, and higher selling costs for smaller quantities directly related to the sales investigation? (6) Critical circumstances allegation.
Steel products from Italy	A		A						T	(1) Below-cost allegation. (2) Should grants be subtracted from production costs to avoid double counting? (3) Critical circumstance allegation.

Steel products from Luxembourg	A	N	T	(1) What is "similar merchandise? (2) Were HM sales inadequate, thus requiring FMV based on sales to 3d countries? (3) Below-cost allegations. (4) Should grants be subtracted from production costs to avoid double counting? (5) Was advertising expense attributable to a later sale? (6) Was technical service directly related to sales investigation? (7) Critical circumstances allegation.
Steel products from the Netherlands.	A	N	T	(1) What is "similar merchandise? (2) Below-cost allegation. (3) Should grants be subtracted from production costs to avoid double counting? (4) Critical circumstance allegation.
Steel products from Romania	A	A	S	(1) Was Romania state controlled? (2) What market economy should be surrogate? (3) Critical circumstance allegation.
Steel products from United Kingdom.	A	A	T	(1) What is "similar merchandise? (2) Below-cost allegation. (3) Should grants be subtracted from production costs to avoid double counting? (4) Were direct selling expenses directly related to investigated sales? (5) Was claimed inventory adjustment in the "ordinary cause of trade"? (6) Can claimed difference in merchandise be based on ratio of variable costs? (7) Critical circumstance allegation.

AD/CVD DETERMINATIONS 1981–83[1]

CVD	AD			
	Preliminary	Final	Preliminary	Final
1981:				
Affirmative	6	4	7	4
Negative	0	0	2	1
1982:				
Affirmative	43	31	14	7
Negative	5	4	0	0
1983:				
Affirmative	7	11	4	2
Negative	2	1	0	0

[1] Through week of April 11, 1983.

Note.—Case totals may differ from number of filings because cases may have been grouped or because of negative ITC actions.

Chairman GIBBONS. How many cases do you now have pending, do you know?

Mr. HORLICK. Off the top of the my head, I think it is 55 active investigations, give or take a few. It changes as new ones arrive and old ones are decided.

A major change which was made in 1979 was mandating reviews of past orders, and there are 140 of those. Indeed, it is a well-kept secret, but literally two-thirds of the resources we spend on antidumping and countervailing duties are spent on the annual reviews.

Chairman GIBBONS. I realize that a lot of your work is doing that. I want to ask you later on what the impact of that has been not on just the agency, but upon the practice.

All right.

Mr. HORLICK. I should warn you that it is a long list.

Chairman GIBBONS. I realize it is a long list, but I want to have the list and try to examine it. If there is any way of breaking it down into categories, or organizing it to make it a little easier for us to understand, I would appreciate it.

How many of the cases you now have are over a year old, and I am not talking about the reviews.

Mr. HORLICK. Virtually none. The statutory deadline permits a maximum of 14 months for antidumping cases. I always have a hard time remembering all the possibilities.

Chairman GIBBONS. There is a vast number of possibilities.

Mr. HORLICK. In a basic countervailing duty case, the preliminary determination is due in 85 days, extendable to a maximum of 150. Then it would take 75 days after that for a final determination. So what you are looking at is at most 7½ months on our side of the House, and then a few more in the ITC. Those I dare say would never be more than a year old.

A few dumping cases that are exceptionally complex can be. Again, the preliminary relief for the U.S. producer comes after 7 months at the latest. So these things do not drag on. People frequently propose that we should handle these proceedings through the court. There may be other reasons for doing that, but speed is not one of them. With all due respects, we are faster than most courts can be.

Personally, on the subject of deadlines, and I may be taking advantage of this to go into the area in general, I cannot with a straight face recommend shortening the deadlines. I know everyone always says, "Let's do it faster. We need the relief soon." Five months for a complicated countervailing duty case is not a long period of time and has proven to be a a real strain administratively.

The kinds of petitions people have been filing have been that virtually the entire country is a subsidy, and that we should go and investigate it. We do go and investigate it. There have been enormous petitions sometimes, and sometimes very vague ones.

I don't think that you are going to get a better result or a cheaper result or a faster result by cutting back on the deadlines for preliminary determinations, because what you will get is worse decisions, which are more likely to be challenged in the court, and that just stretches the uncertainty out further.

I would go a bit further. Frankly, I think the timetable is too short. Last year, with our highest caseload in history, because we made a fetish of making the deadlines for the first time ever in living memory we made every deadline. It was quite an effort.

I have no objection to people getting their relief quickly, but I don't think short deadlines help the petitioners. This is from my experience not only in the Government, but as a lawyer. I have always been at a loss to understand why some industries want to shorten the time.

What happens mechanically is: We get a petition, we initiate, we send out a questionnaire, we get back the questionnaire response. That is the crucial moment. When the petition is filed, the domestic industry had time to prepare and the foreign one hasn't. They are at a slight disadvantage especially before the Commission, which is Charles' business.

Once we send out the questionnaire, the foreign respondent, hopefully well counseled, goes off and concocts the best response it can come up with, and it is the job of the Commerce Department to try and find anything that is being hidden in that response. It is very much an adversary proceeding in that respect.

Clearly, it is the petitioner's interest, if it wants to be looking over our shoulder, to have the most time possible to look over our shoulder. I know that several U.S. industries told you in 1979 that they didn't want that. They wanted to go real fast.

I still don't understand why. I, and some other people that I know, testified on behalf of domestic clients that we thought that was a very bad idea, because it doesn't give you the time to actually sort out what the foreign respondent is saying.

In general, the most important thing is how quickly preliminary relief can be given, and that is 5 months at the most for countervailing duties and 7 months for antidumping. The real loss of time is getting your petition together in advance, and that goes in part to getting it ready for Commerce, but most of the time, at least in my own experience, is getting an injury case ready.

Because there is a preliminary injury determination within 45 days after filing, before you file a petition you have to have a really solid case put together, because there is not going to be any time in those first 45 days to get it ready for the Commission.

You want to get your best case to the Commission in advance, especially since it is the one time when you as a domestic petitioner have the biggest advantage over the foreign respondent. You come in with this perfectly prepared case, you have your briefs written, and everything else, and some foreign respondents literally don't have lawyers for 2 weeks.

The argument for speed doesn't impress me.

Chairman GIBBONS. You have to decide in a subsidy case whether or not there is a subsidy. Then, ITC decides whether there has been material injury.

Mr. HORLICK. That is correct.

Chairman GIBBONS. When does any kind of holdup in the appraisement take place?

Mr. HORLICK. That is the 5 months maximum, typically less, for the countervailing duty and 7 maximum for dumping.

Chairman GIBBONS. When is Customs put on notice to holdup on appraisements, is it as soon as you make the decision?

Mr. HORLICK. Yes.

Chairman GIBBONS. Let's leave ITC out. As soon as you make the decision, Customs then puts a hold on appraisements?

Mr. HORLICK. A couple of days elapse. Technically, it is effective on publication in the Federal Register. We send it to the Federal Register at once, and it takes 2 or 3 days to be published. So it is 5 months and 3 or 4 days after the petition is filed that Customs is on notice to hold all entries if we found a subsidy, and to require a bond to cover the amount of the potential duty.

The trade impact of these cases is as follows, and I am talking in practical terms.

Chairman GIBBONS. That is what we want to talk about.

Mr. HORLICK. When a petition is filed, people start thinking. In fact, a frequent technique of domestic industries is to start floating rumors in the hope that the foreign exporters will back off. There are some interesting antitrust problems there.

When a petition is filed, obviously foreign companies start thinking about what they should do, and there is no universal pattern. Some decide to do business as usual. Some decide to cut back on their exports. Some raise their prices. Some try and flood the market. There is no pattern.

Forty-five days after the filing the ITC decides whether or not there is preliminary indication of injury, and that is the crucial moment. If the ITC finds preliminary indication of injury, which they have been doing more often than not recently, then the foreign producer knows it is in for a long fight, and typically starts adjusting its sale patterns.

Once the preliminary determination comes out that there is a subsidy or dumping, then you have a formal trade impact. Appraisement is withheld. Bonds are collected, and bonds cost money. More important, once the bond is in place, no one knows what the final price is going to be until they see our final determination, and it messes up the marketplace because very few people want to sell or buy if they don't know what the final elements of cost will be. So there is a sliding trade effect culminating at our preliminary determination 5 or 7 months out.

Chairman GIBBONS. Let me start at the beginning to make sure I understand this. I am going to file a case as a lawyer here on behalf of a domestic client alleging that there has been a subsidy. I file that case with you. Do I also file it at the same time with ITC?

Mr. HORLICK. Correct.

Chairman GIBBONS. ITC has how long?

Mr. HORLICK. Forty-five days.

Chairman GIBBONS. It has 45 days to make a preliminary determination about injury?

Mr. HORLICK. Yes.

Chairman GIBBONS. You have 5½ months to determine, is that right?

Mr. HORLICK. Five months.

Chairman GIBBONS. Five months to determine whether or not there has been any subsidy.

Mr. HORLICK. Right.

Chairman GIBBONS. When does Customs first start imposing additional duties?

Mr. HORLICK. They freeze liquidation and collect bonds starting in 5 months and a few days. Then they continue to do that. In fact, they often don't collect the final duties until we have had our first postorder review.

It gets very complicated, but for practical purposes, starting on the day of our final determination everyone knows what the amount of the duty will be, and people have taken that into account in their business dealings. The actual collection begins later, but the amount is known.

Customs, after our preliminary determination, collects a bond, and typically the fee for a bond is about 1 percent. It is a cost, plus there is a liability for it. Once our final determination comes out, they collect a deposit and a deposit is cash. That is cash flow, and people don't like it, it is the same as paying the money.

Chairman GIBBONS. I guess one of the questions that arises at this point is, would it be wise to shift forward Customs intervention as soon as a preliminary determination has been made on material injury?

Mr. HORLICK. I have heard the suggestion made, but there are a couple of problems with it. The first one, of course, is that that means technically someone could come in with a good injury case, but a totally frivolous subsidy or dumping case, one that literally doesn't exist.

Chairman GIBBONS. I am not talking about dumping. I am talking about countervailing duties.

Mr. HORLICK. Subsidies as well, because we can't dismiss the allegation on its face without investigating it. They could distort trade by requiring this freezing of liquidation for 5 months even if they know that there is no subsidy. Someone could play the system, and believe me the system is being played right now in other ways. For Congress this is a matter of trade policy, but for an individual petitioner, it is just a weapon of commercial warfare.

Chairman GIBBONS. Certainly, I understand.

Mr. HORLICK. The other objection, of course, is that for better or worse the GATT codes prohibit the imposition of those preliminary measures until there has been a preliminary determination on both injury and subsidy. So we would be in violation of the codes.

Chairman GIBBONS. I wouldn't want to violate the codes.

I don't want to monopolize the conversation. Let me first go to Mr. Schulze, and then I will come back.

Mr. SCHULZE. Thank you, Mr. Chairman, and I appreciate that line of questioning because it is the same direction I was going to go.

It would be, in my opinion, most beneficial if we could do something like that, even if we put on the filing company the burden of paying the bond if their case was not proven. Would that be a sufficient deterrent for a frivolous case?

Mr. HORLICK. Let me add the caveat that anything I say from now on is my personal opinion.

Chairman GIBBONS. Certainly, and we understand that. We don't want to get you into trouble with your agency, or OMB, or whoever. We are just here trying to find solutions to problems. We want to going to work cooperatively.

Mr. HORLICK. As I said, there is a problem in the codes. I didn't negotiate the codes, but I know the people who did and they were not exactly giving it away. Obviously, in order to get something, they had to give something. Once you start unraveling it, you have got to give something, if you are going to get something.

It would make it look fair, and I think that it would discourage a lot of people from doing it on a purely frivolous basis because it would cost them money.

Mr. SCHULZE. Then if somebody had a real good and solid case, they would then be willing to go in and take that risk.

Mr. HORLICK. I would add that you get some really creative ones, but subsidies by their nature are public. In most subsidy cases, the question isn't is there a subsidy or not, except for the more creative ones, it is how much. So the people wouldn't be running much risk, as the chairman suggested, after a finding of injury.

Mr. SCHULZE. In your opinion, Gary, would that lessen or eliminate the violation of GATT?

Mr. HORLICK. I would rather not say for fear of being quoted for GATT purposes.

Mr. SCHULZE. All right.

Mr. HORLICK. You can take my smile as a comment.

Mr. SCHULZE. It certainly would be, perhaps, a little more acceptable, I would think, and perhaps one method that we could attack that problem with.

One of the big complaints, of course, is the cost of filing and following through. Through your experience, do you see any way that we could make the process a little more efficient to cut down that cost?

Mr. HORLICK. I have a number of suggestions which I will take the liberty of unloading on you.

Chairman GIBBONS. Please.

Mr. HORLICK. Let me explain the process. We are looking at these in great detail on a technical level. We haven't even made up our mind within the Department of Commerce. In fact, within my own office, we haven't fully finished, but we are pretty near finished. After that, I want to sit down with the USTR and go over it with them, since they share an obvious interest in this. Then we will go through it with all the other agencies.

Having said that, I am not going to give you the actual wording, but I will give you the things which strike me personally as being areas well worth attention.

First, and a number of people have told you this, is the whole question of judicial review. That is the first point.

I think judicial review is wonderful, and it may sound odd. It was a major change in 1979, and it is extremely beneficial. It keeps the whole process honest. Even without being sued, it keeps us honest. Its mere existence is terribly helpful, and I am a big fan of it. The problem is that I think in an excess of zeal we allowed interlocutory judicial review, meaning that you can sue us before our final decision. This is a good example of something that is a useful protection for U.S. industries. But is the amount of protection they get worth the added expense for everyone, not only them but the Government?

What happens is, there are very short statutory deadlines. In a countervailing duty case between our preliminary and our final determination there are 75 days. So if someone doesn't like our preliminary and sues us, even with the expedited schedules for briefings and hearings the courts have been giving, we are not going to have a decision until about 35 days at best. So they will get maybe 35 or 40 days of extra relief, and then it starts all over with our final determination which may be different.

In the meantime, the effect on us is dramatic. In a typical case—steel was not a typical case—in a typical case, we have one or two people working on it more or less full time. Between the preliminary and the final they are supposed to be making changes necessary, frequently at the request of the petitioner, to make the result a little more accurate. Suddenly, they also have to assemble a massive record for the court, and help the attorneys in the Justice Department and Commerce who are defending the case. It just does't work.

There are two conflicting thoughts there in the 1979 act. One that there should be interlocutory judicial review, and second that we should make the decision very quickly. Those two don't work together.

As I said, I think judicial review should be available, and it is, for all of our decisions and the ITC's. My suggestion would be to roll it all into one proceeding once there is a final decision, so you don't have piecemeal attacks. Again, a lot of domestic industries that can afford it would prefer the piecemeal attack. They would rather wear out the Government. But business can't do that.

The second aspect, which is another thing which I view basically as a technical change, is access to confidential information under protective order. This was another major change in 1979 and has been very beneficial.

Before 1979, if you were representing a domestic petitioner, what would happen is you would get back a nonconfidential summary which told you nothing, and in your comments you were shooting in the dark. It was very frustrating. In my sordid past, I worked for both domestic and foreign clients. Representing foreigners, it is a real art form drawing up one of these nonconfidential summaries to say nothing, and it was part of the game.

Now, under the law, the confidential responses are made available to the petitioner's lawyer, and that concept has worked very well. We get much better comments from petitioners now and there is much less mystery, and I think a lot less unhappiness, because people actually see what we are doing. This is the transparency which I think is important.

The problem is, it takes too long to get the information to petitioners. We tried to simplify it. When the steel cases came up, I realized that this just wouldn't work. They wouldn't have time to comment. So I tried to simplify the procedures. The Court of International Trade held that we had done it wrong.

Let me go through a procedure right now. Let's say we get a questionnaire response which is confidential, as most of them are. They contain very sensitive information, and I am proud to say that so far there has been no evidence of any leaks. Under the court ruling last year, after the questionnaire response is received, then the domestic industry comes in and has to request the information and justify why they should get it. We have to give the foreign people a chance to say why they should not. We then have to give the foreign people a chance to withdraw the information, and so on.

We will be proposing, if I have anything to do with it, a procedure for telescoping all that and putting it as far in front as possible. For example, and this is not carved in stone, we could have the petitioner file a standing request to be supplemented as necessary, and we could have the person filing confidential information submit with that filing any objection it has to release and why, telescope the whole process.

Right now, domestic industry has the right to see that information, and there is no way that we can get it to them with enough time to make it all that useful. Part of it is our fault, we can't process it fast enough. Why? As I said, in a normal case, we have two people working on the case. They get the questionnaire response in. They are busy analyzing it, doing verification, and sometimes they are out of the country on a verification, while at the same time they have to process this whole back and forth on confidential information. It doesn't work, but no one else can do it because no one else knows the case well enough. Without going into the details, I think a change is necessary there.

A third area of potential change, which will be much more controversial and much more difficult will be simplifying the antidumping calculation to reduce the number of adjustments. I don't know what we are going to come up with, but what we have is a set of possibilities between infinite numbers of adjustments and no adjustment. The important thing is to come up with a balanced package that doesn't tilt in favor of domestic or foreigners, but reduces the number of things people can argue about.

I don't promise you that we will come up with something, but I promise you we will try. I warn you that this will be a package of a lot of small things and every single one of those small things will attract someone who will tell you that you shouldn't change it. So I don't envy you your job, because it will be your decision, but we will come up with something if we can.

A fourth aspect is improving the process for the annual reviews of old orders, and some of it is technical. There are some wording problems in different sections of the statute which we think hamstring us in getting the thing underway.

We would modify the time limits, and we would also alter the revocation procedure somewhat so that we can kill really old cases. We have cases on the books, our oldest one now dates from 1922, and whatever it is it can't be all that relevant now.

Maybe there are some legitimate old cases, but there ought to be some sort of procedure for automatically revoking cases if there is no interest in them. Indeed, as Charles will tell you, ITC has had a number of reviews on injury grounds of old cases where the industry has said they are no longer interested. There is a procedure now and we think it ought to be refined simply to save everyone time, money, and effort.

Mr. SCHULZE. It would be a review procedure, or an automatic determination?

Mr. HORLICK. I wouldn't make it automatic. I would have something like a sunset within *x* years unless someone comes in with information, something ranging from a simple objection to having to make a case of some degree. Again, this is personal opinion.

The fifth item would be some refinement of the countervailing duty law. As I said, we don't think we have been very shy about using it. There are a couple of things we have done, which fortunately we haven't been challenged on for reasons I will get into, where I knew I was doing the right thing, but I wasn't absolutely sure I could make it stand up in court. I thought 60-40 would stand up in court, or I wouldn't have done it.

A good example, New York City's subway cars. As a matter of policy this was a very important case. A lot of people criticized us, but we went out and found something which I think U.S. industry and U.S. unions think was wonderful, and we were doing the right thing. A lot of foreign countries didn't like it, and every export credit subsidizing agency in the world is now scared stiff of it, and that is good, because that was the whole point. We decided that there was a very large subsidy implicit in this kind of subsidized export credits, which I think is one of the most pernicious forms of subsidy.

This was as clear an example of shifting unemployment as you could find, and the Canadian Government would probably admit that in private. They oppose subsidized export credits, but when they have unemployed workers in Quebec, they would rather have them employed in Quebec than in Michigan.

However, there are some technical snags there. None of the subway cars were being imported, and in fact they won't be imported for years, and the statute says "imports." If the case hadn't been withdrawn as it eventually was, I am pretty sure that we have been sued on that by the parties in interest with the importer saying that we had no authority to reach something that had not been imported.

So there is some language change needed to make sure that we can reach these large capital goods which frequently are ordered years in advance, and indeed the injury won't really occur for years, but you have to stop it now.

Mr. **Schulze**. Was there a threat of injury?

Mr. **Horlick**. There was a threat of injury and the Commission, in fact, found preliminary injury based on that. I am worried that we would be hamstrung for purely technical reasons in the statute for reaching that because there was no import. So there are some refinements there.

Another goes to leases. Right now the dumping and countervail statutes cover sales. Quite frankly, and I hope anyone who is interested is listening, if someone dresses a sale up as a lease, we will follow good IRS practice and disregard the form for the substance. If someone leases a machine tool with a 20-year life and it is put in concrete in the plant and leased for 20 years, I think you are looking at a sale, but I would rather have absolute legal authority to go after it.

The sixth matter goes to greater use of sampling and averaging. One of the main problems with the annual review process right now for dumping is, under the statute, we have to literally look at the actual price of each sale in the home market and in the United States. We could be talking about hundreds of thousands of sales. It is just not worth that kind of precision in the assessment phase, and it ought to be done on an average basis, and we would like authority to do that.

There will be minor effects, and I am not sure which way they go to be honest. I would give up some of the thousandths, or hundredths, or even tenths of percentage points for just getting rid of that enormous quantity of work.

The same is true on countervailing duties. We frequently use countrywide rates, and I would like to push that even further. I will give you an example of one where we do. In the case of fasteners from Japan where there is a countervailing duty order, there were 3,000 producers. If the court ever holds that we have to calculate a separate rate for each producer, we are all going home.

Seventh and last is the problem of dealing with nonmarket economies, and this I have been worried about for some time. I can only tell you that it is getting worse.

The current system of handling dumping from nonmarket economies yields totally random results which have no connection to reality. I could, if I were so minded—I assure you I haven't been—come up with any number I wanted. I jokingly say that we use a roulette wheel and someday we are going to publish double zeroes. It is absurd.

As many of you know, with a nonmarket economy, by definition, you can't use their prices or costs. It makes no sense—I am preaching to many of the connoisseurs here. I know that Congressman Schulze has been interested in this, and I know many of you have looked at it. We find a surrogate, some third country producer. All of that is nonsense—there is no such thing as a comparable economy. So in theory it is nonsense, but in practice it is even worse because you have to find someone who will give you information which they have no interest in the world in giving to you.

In recent case involving Chinese print-cloth, we finally found someone after we talked to 20 producers in eight countries. I think we spent about $20,000 looking for a surrogate. In Chinese shopcloths, we never did find anyone who made any sense, and we wound up using an average of all imports for our preliminary, and I don't know what we are going to do for our final.

For Hungarian axles, we used Italy. For Chinese menthol, we used Paraguay. To say it is to laugh about it. There has to be a better system.

I think Senator Heinz offered a very good compromise in the last Congress that didn't go anywhere because half the world thought it was too hard on the nonmarket economies and half thought it was too soft. That convinced me that it was the right thing, but it also means that politically it was unacceptable.

Without wishing to suggest now what should be done, and obviously I have my own ideas, what is needed is something that is first of all nondiscretionary. The dumping and countervailing laws as they apply market economies are nondiscretionary. U.S. industry, including workers, should have an equally nondiscretionary remedy against imports from nonmarket economies. The fact that they don't have a market economy shouldn't get them out of the nondiscretionary laws. That is the first thing.

Right now, to be perfectly candid, the nonmarket dumping law is fully discretionary because I am sure I could doctor any number and make it stand up in court.

The second aspect, and this is a very important one in terms of just trade flowing as it should, under the dumping laws and the countervailing duty laws, if you are a foreign exporter, you can comply with those laws. You don't have to violate them.

There are some exceptions to that on the fringes of the countervailing duty law where you don't think that it is a subsidy and we decide it is, but basically you know if you are dumping because dumping is selling below your home market prices or costs, and you know what those are. You know if you are being subsidized because you have to apply for the thing.

Fairness means that we should not discriminate against nonmarket economy people as we do now. Right now if you are selling something from a nonmarket economy here, there is no way on earth you can know if you are dumping. You don't know what we are going to choose as a surrogate, and we don't know. It should be predictable.

The third reason for predictability is, if you are a domestic petitioner and you are dealing with a dumping or countervailing duty case against a market economy, typically you know pretty much how commerce will come out. You don't know how the ITC will come out. No one ever made money betting on them, least of all me, which is a tribute to their independence I think.

Dumping can be hard to call, sometimes petitions get filed on bad information. Subsidies are usually public, and you usually know if there is a subsidy, so you just argue about the amount. With a nonmarket economy, though, I think a lot of people, especially smaller industries, don't file petitions because it is totally unknowable and very expensive.

I can think of some specific cases where instead of an antidumping petition, something else was done because we cost so much more than the other thing and we are so unpredictable. Again, big industries can afford it, but small industries can't.

There may be some potential GATT problems with GATT members, but basically everyone who administers these laws has problems—not just in the United States—I have talked about this with my counterparts in the EC and Canada. Indeed a number of the countries that I mentioned that have passed laws pass them so that they can bring dumping cases against nonmarket economies. They then come to us and ask us how we do it. I tell them, "Here is how we do it, but you shouldn't do it this way."

We are going to continue to trade with nonmarket economies, I suspect. If there are political reasons for not trading with one or another of them, fine, so be it, and there are methods for taking care of that. Obviously that is a political judgment. We shouldn't let our trade laws be either encouraging unfair imports from nonmarket economies or discouraging fair ones, and right now no one knows what is what.

I don't have the answer for you, but once we finish within the Administration, I will try and get one. I do tell you that it is absolutely essential that one be found because what we are doing now is silly.

I am sorry to take up so much of your time, but those are the things that I think are essential.

Mr. SCHULZE. I thank you. I thought it was very candid and very refreshing, and I agree with nearly everything on your list. I think that is very, very good and helpful information to us.

Gary, is there any device set up—I assume, as you go through a case most of the information is computerized. If a small firm came in 6 months, 9 months, or 1 year later, is that kind of information available to them? They could come in and ask for assistance, and you would say, "Look, we would recommend that you don't do this, but that you do this, because we had a similar situation. Here is the information. Look this over, and come back and let us know what you want."

Mr. HORLICK. A couple of answers. First of all, anyone who comes in, I will sit down with them and give them a reasonably straight opinion. I try not to give advisory opinions, but I try to give at least some indication as to what remedy to look at. People come in and say, "Is this a subsidy," and I just won't tell them because I don't think that is proper.

I think I can personally take credit for two section 337 cases, and frankly that is what I did as a lawyer also. Someone comes in and says, "I have an import problem." The question is what remedy applies. I do that a lot and so do other people in my office.

In conformity with the 1979 act's provisions, we have put together a library so that we have available information in hard copy, and in a few months I think or maybe now it is going to be an online system with computers, on every case where we found subsidies in the past. We are not going to give advisory opinions, but we will show them everything we have done in the past.

For dumping cases, that is harder to do. Literally if something is a year old, because the exchange rates change so much, it wouldn't necessarily be relevant. But we certainly sit down, especially with small businesses, and tell them how to do it. A lot of people show us draft petitions. The Commission does this also.

We try to lean over backward with small business. The problem with small business occurs after the petition is filed. We can help them and show them how to do a petition, and all those things to get the petition filed. What we can't do is help them afterward. We are neutral.

Because of the statutory requirement that we make decisions supported by substantial evidence in the record and be neutral, we can't advocate one side's position, and the same is certainly true before the Commission.

Mr. SCHULZE. The reason for the question is that I have heard figures that the average case will cost approximately $1 million.

Mr. HORLICK. Certainly a minimum of $100,000, the absolute minimum.

Mr. SCHULZE. That is pretty tough for a small business. I was just wondering if there are some other ways that you can think of that we can expedite this process and not have that kind of a financial burden because that in itself will discourage most people from filing.

Mr. HORLICK. I think what we have is a antidumping and countervailing duty law for companies grossing more than $25 to $30 million. The $100,000 minimum cuts out a lot of people, but that is not the cost of filing, that is the cost of the whole case. The way to reduce the costs is the procedural simplification I mentioned, just to have less points of argument. I would point out, as I did earlier, technically they don't have to spend a cent. They don't have to contest every point, but that is not the American way.

Last year, no, I guess it was 1981, I remember there were two petitions filed by people on their own behalf. One won and one lost.

Mr. SCHULZE. One final question. Is there any merit to partial reimbursement in such instances? I wouldn't want to make it total because then you would encourage every attorney to drag things on. If there was some way to make them partially whole, so that they would just not have this undue financial burden.

Mr. HORLICK. This will be totally my own personal opinion. As a matter of justice, reimbursement of legal fees for people who have prevailed sounds fair. It is one of the drawbacks of our whole system, not our trade law but our whole justice system, that you get the justice you can afford, and that is not true in other countries.

What this would be would be basically reimbursement of legal services for businesses. You could cut it off, I think, using Minority Business Development Agency guidelines or something so that you weren't helping big businesses, although maybe you want to.

Mr. SCHULZE. Maybe a sliding scale, perhaps.

Mr. HORLICK. To be fair, do you want to reimburse foreign companies that prevail? It actually costs them more defending one of these cases.

Mr. SCHULZE. We could have a reverse sliding scale. [Laughter.]

Mr. HORLICK. Finally, if you are going to do this for businesses on the trade side, why not do it for everyone. I leave the political problems to you.

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Mr. **Jenkins**. Let me follow up on this small business problem. You now have the authority to initiate, do you not?

Mr. **Horlick**. Yes.

Mr. **Jenkins**. Do you exercise that right very often?

Mr. **Horlick**. Very rarely, and let me explain why. A lot of the reason is technical.

Congress in 1979, this is my understanding, was very concerned about the small business aspect and put in a number of things to help small business, some of which have been more effective than others. The most effective thing that was done for small business was the provision that a petition need only contain information which would be reasonably available to petitioners.

We have a much lower standard for a tiny business than for IBM. If IBM wants to allege subsidization—I picked on IBM because they haven't, but I could name some others—we expect them to come up with some pretty decent information. If it were Mr. McCurdy who catches herring off of Maine, we would work with him pretty closely. That has been the most effective.

Self-initiation, it sounds good but it doesn't really work the way you think it does. Self-initiation means that we would initiate the petition based on information we have. On subsidies, we sometimes run across some of the information in bigger industries, but usually not in smaller ones. On dumping, it would be very rare that we would have that kind of information. We are not experts in every industry.

Our last dumping case was knitfiber from Korea. I don't know what the costs should be or what the prices should be or anything like that. So you are going to have to depend on the industry for the information anyhow on the dumping side.

Much more important and the reason why you don't do a lot of self-initiation is the injury side. Let's say we self-initiated a case. We decided that there is something wrong in the widget industry and we self-initiated even though the industry wasn't working on it and they weren't interested. We send it over to the International Trade Commission, and no widget producer goes over and says "I am being injured." I can predict a 5–0 or 3–0—whatever the number of Commissioners is—vote of no injury.

So in order to really have a case, whether it is self-initiated or not, we need two things. First you need an injured industry that is willing to go over to the International Trade Commission and say they are injured and show them some data that they are injured, because I don't know what their profit and loss statements look like. Second, we need an industry that can help us, that can tell us how the industry works and what imports should cost, et cetera, et cetera. If you have those two elements, that is the petition. I don't understand why the industry won't sign the petition. That is all they would have to do. They would be giving us the other information anyhow.

Mr. **Jenkins**. Maybe they wouldn't. Let me speculate and maybe this is not true.

Why couldn't an industry that simply couldn't afford it say:

> We are not going to file the petition because we can't afford it, but we look to the Department of Commerce, who has the authority to self-initiate, to protect us. So we will provide you some information and hope that you will self-initiate.

Why doesn't that occur?

Mr. **Horlick**. If they do that, it literally doesn't cost them a cent. All they have to do is sign the petition, so why should we self-initiate.

I will give the reasons where we should self-initiate, I think, but basically in the situation you described, there is no filing fee and all they have to do is sign their name.

Mr. **Jenkins**. Let me ask you about this, because I don't understand the process. Let's say they filed a petition.

Mr. **Horlick**. If they file a petition, we will go out and do a full investigation, and they don't have to spend a cent.

Mr. **Jenkins**. Then they don't have to do anything else?

Mr. **Horlick**. In practical terms, they had better go over to the International Trade Commission, which doesn't cost them anything if they want to do it themselves, and say, "We are being hurt."

Mr. **Jenkins**. What is their chance of success, or why the $100,000 figure?

Mr. **Horlick**. Because Americans don't trust their Government to do it right, honest. I don't say that jokingly.

Mr. **Jenkins**. Based upon past experience in these cases?

Mr. **Horlick**. De Toqueville referred to this phenomenon in 1830 before we had trade laws. It is part of all of us.

We will do a full investigation and so will the ITC, and a fair one.

Mr. **Jenkins**. How many cases have you self-initiated?

Mr. **Horlick**. In the last 2 years, we have self-initiated 10, which is 6 more than the total in all past history. The 10, I hasten to add, though, I don't want to make it look like we are doing it, were done under the steel trigger price mechanism whereby the prior administration had promised to self-initiate cases if certain circumstances occurred. We followed through on that promise more than the prior administration had.

Let me explain what was involved in that self-initiation. You had an industry—In fact, I am perfectly willing to say it, all through the summer of 1981 the industry was telling me not to self-initiate cases because they didn't want them initiated until they knew they could win their injury cases.

The industry went out and put together a full injury case. It went over to the Commission and proved it. It spent a lot of money on it. We self-initiated because we had promised.

My view of when we should self-initiate is the following—In a situation like you described there is no reason why they shouldn't be able to sign their name. The usual reason why people don't want to sign their name to a petition is that their customers get mad at them. They are cutting off cheap imports.

Their customers are going to get mad at them whether they sign or not because those same people who won't sign their name are going to have to go over publicly to the International Trade Commission. I don't think the Commission is going to take anonymous witnesses.

The place where we should initiate, my sort of model, and we almost did it once—I won't describe the case but I would have pushed for it—is where say you have a multinational that makes the product here and in lots of other places and is either the importer or isn't concerned by the imports, or for some other reason won't bring the case. Even though it has a good case that it is being injured and there is dumping or subsidization, it has so many other irons in the fire elsewhere that it has other reasons for not doing it.

Who is being hurt there? Not the corporation, because they have made their own analysis of where their interests lie, but the workers. That is the case where we ought to be willing to really self-initiate, but again the statute provides for their right to petition. All they have to do is sign the petition. They don't have to spend money. Again, they may want to, but they don't have to. We will go out and do an investigation without anyone spending a cent.

Self-initiation really becomes a political statement that people want us to self-initiate, and it becomes a political football. I don't think that it should be done that way. The multinational situation to me is the one that comes closest, where the workers are being hurt, but the company has too many different interests to bring a case.

Mr. **Jenkins**. Is there any basis for the lack of self-initiated petitions by the Department, dependent on the fact that you don't have the personnel to really look at this very well?

Mr. **Horlick**. This really goes further afield. It doesn't go to self-initiation so much as whether—I am anticipating you and I probably ought to keep my mouth shut—we should actively go out and seek after cases. The argument for that is obvious. The U.S. Government should be aggressive in rooting out unfair trade practices. The arguments against that are several.

First of all, it will be done to us in spades. Second, frankly, right now we are stretched absolutely thin on caseload. The caseload right now is very high in historic terms, and I don't have the people. Third, it really goes to the injury question. If someone is being hurt they are usually not shy about coming to see someone in the U.S. Government. These laws have gotten a lot of publicity in the last few years.

As I said, I think self-initiation is the wrong focus because if someone wants to go through all that work, we will sit down and work with them even with our current caseload, and all they have to do is sign their name to a petition, which isn't asking a lot of them. They don't have to spend all that money.

Mr. **Jenkins**. That is the point that I can't see. We say that there is a problem with small business. You indicated a moment ago that really our trade laws protect those with more than $30 million.

Mr. **Horlick**. That is a guess.

Mr. **Jenkins**. I understand that.

Really the smaller business simply cannot afford it, and yet you are saying that they really can afford it and all they have to do is sign their name to the petition. You will do the rest.

Mr. **Horlick**. What they can't afford is to keep an eye on us. The petition is not the expensive part of it.

Mr. **Jenkins**. Is that the most expensive part, keeping an eye on you?

Mr. **Horlick**. Yes. The $100,000 is spent constantly monitoring things, challenging things we do on both sides. It is not in putting the petition together. That is why it is so expensive.

Mr. **Jenkins**. We spend so much time with habeas corpus in Federal court from indigent people, it would appear that we could spend at least as much time on indigent small business.

Mr. **Horlick**. The problem is not self-initiation, it is funding them to be able to participate in the proceedings.

Mr. **Jenkins**. Is it so technical that they almost have to have legal help each step of the way?

Mr. **Horlick**. Right. One of the ways to relieve that burden, to make it less complicated, is to reduce the number of opportunities for fighting.

Take this question of interlocutory review. It is a protection for a small domestic business that it can't afford. Even if I self-initiated the case, I couldn't then sue myself because the small businessman didn't like what I did, and I can't fund a lawyer.

Mr. **Jenkins**. As you indicated, we all have problems with the nonmarket countries. There is no possible way for a medium size or small business to ever hope to get the information from an expense standpoint, and yet they may have a very valid case. It would appear to me that there is a good type of case that the Department ought to consider self-initiating a petition when you see an obvious dumping or whatever from a nonmarket country.

Mr. **Horlick**. The nonmarket countries, with all due respect, I don't think are a good example because we never know if they are dumping or not until we go through an investigation.

Even with an obvious subsidy case, I wouldn't know that there is an injury case there unless the industry is telling me. I don't know whether they are making money. They are always telling me that they are losing money. I would have to look at their books, and they are not going to show me their books.

The small business focus, I think, is correct. I don't think self-initiation is the answer. Part of the answer is reduction of the complexity. Part of the answer is that very honestly we do do the cases ourselves. They don't have to go chase us down.

Mr. **Jenkins**. What really happens, as all of us know, these companies don't want to spend the money, so they come to the Congress to get statutory relief. Then we commence the merry-go-round.

Mr. **Horlick**. I can think of a large number of cases in the last 2 years where if the petitioner had done nothing, they would have gotten the identical relief, and they got relief. I am not saying that their lawyers were worthless. It is just that basically we have a responsibility to investigate on our own, and we do.

Mr. **Pease**. Would the gentleman yield?

Mr. **Jenkins**. Yes, I will be happy to yield.

Mr. **Pease**. Isn't there a similarity between this case and social security appeals?

As a Member, I have many people requesting assistance every day—with their social security appeals. There is an automatic procedure for doing it, and yet they go out and hire private lawyers and who knows whether the result would be any different.

Mr. **Horlick**. It certainly sounds familiar. I can think of cases where good lawyering has turned this around, where someone made a convincing argument and that is highly technical.

Take the subway car case. Frankly, if the petitioner had done nothing, we would have come out the same way. We spent a lot of money on that case.

Mr. JENKINS. What percentage of the petitions do you accept?

Mr. HORLICK. It must be 99 percent or close to that figure. That is not quite a fair figure because people will withdraw petitions if we tell them we are not going to accept them. Even in real terms, it is 90 percent. Typically, if someone files a defective petition, we tell them, "Here is why it is defective. Go cure it".

A couple of petitions were filed by importers who didn't want the other import coming in. We told them that we couldn't accept it because there is nothing in the statute that gives them a right to protection under these laws.

Mr. JENKINS. Let me ask one other question. There are so many questions I want to ask, but my time is limited.

In response to Mr. Schulze, you said that in 45 days the preliminary determination is made as far as injury. Then 5 months later, the Department makes its decision. They increased duties, if there are any, through the bond until the final preliminary is made, becomes effective five months and three days later. Is that right?

Mr. HORLICK. Right.

Mr. JENKINS. So during that period of time between 45 days and the 5 months, even though there ought to have been an increase, there is no increase. Is that right?

Mr. HORLICK. Right.

Mr. JENKINS. So where you have the possibility of either harming an importer because of a frivolous petition, or the alternative of harming a domestic industry that was in fact harmed or injured, we come down on helping the importer rather than the domestic industry?

Mr. HORLICK. As I said, it is part of the new GATT codes. It is something that presumably, I wasn't there, we bargained away in return for something else. Certainly, Congressman Schulze's suggestion would help in terms not only of reducing its opportunity for abuse, but also making it appear more fair.

Mr. JENKINS. Is this treated the same way by other countries?

Mr. HORLICK. Yes, the same rules. We would hold them to it also.

Mr. JENKINS. The time is the same?

Mr. HORLICK. The timeframe varies a little, but basically it is not all that dissimilar.

Mr. JENKINS. It is about the same.

Mr. HORLICK. Yes.

Mr. JENKINS. Thank you, Mr. Chairman.

Chairman GIBBONS. Mr. Russo.

Mr. RUSSO. Thank you.

I don't know where to start with you. I didn't realize that you were so consciencious and that everybody was so happy with you.

I constantly have business people telling me that we can only do an effective job with our trading partners if our Commerce Department and the International Trade Commission do their job of effectively enforcing the laws. This would solve our problems.

Now you tell me that even if they simply sign a petition, you would do the job anyway. They don't require a lawyer to represent their interests.

If you are that good and you are doing such a great job, why do so many people out there think that the Commerce Department does such a terrible job, not just your end of it, which maybe is doing all right.

Mr. **Horlick**. No, they mean my end of it. [Laughter.]

Mr. **Russo**. It doesn't even matter what it costs because whether you are a large or small firm, we might streamline a few procedures, but in essence nobody needs to spend any money as long as they take the time, I guess, to file a complaint that would say, "We think we are getting shafted by some industry." They sign their name to it, and you take it.

Mr. **Horlick**. It is a little harder than that, but we have done petitions with people who have not needed lawyers. To be perfectly candid, we have done petitions with lawyers who needed help.

The first reason you hear those complaints is a phenomenon with which you are more familiar than I. You are never going to hear someone come to tell you that we are doing a good job. You can count on that. I think it is important that Congress took that into account in 1979.

The question is not whether I do a good job, but whether the system as a whole does a good job. This doesn't help small business, but if people don't think that I am doing my job, they can sue me and they do.

I would bet that half the people who have come to you complaining have cases in the courts, or worse yet they are complaining because they know we would find against them and, therefore, they haven't brought the case that would enable them to sue us. That sounds like a very lawyerly response, and I guess it is, but it is basically how our system works.

I was talking a few days ago with a U.S. producer of something who I respect quite a bit. He disagrees violently with me, by the way, although personally we get along fine.

Mr. **Russo**. I suspect that it is easy to get along with you. You seem to be a likeable person. Some of the things, I guess, you might do would be enough to drive me crazy.

Mr. **Horlick**. I hope not.

The point that I was making to him is, he says that he knows dumping is going on, but we won't do anything about it unless we can prove it. Basically, this is a reflection of innocent until proven guilty. The reflection in the statute is a requirement that we make our decision based on substantial evidence in the record, and that means putting it together.

Mr. **Russo**. You have to get the evidence, when you go out and hustle the information for somebody. But if it is a policy decision on the part of the Congress, and a case is filed against a certain trading partner, when it is a new policy of moving around a little bit, you are going to find whatever you want to.

Mr. **Horlick**. I can assure you, and you don't have to believe me, that I have not seen a single decision made on that basis in 2 years.

Mr. **Russo**. In your department?

Mr. **Horlick**. Yes, in my office.

Mr. **Russo**. You can't speak for the other parts of the Department of Commerce, can you?

Mr. HORLICK. No, but we handle dumping and countervailing duties in my office. That was a big complaint in 1979. Every foreigner always comes in and says, "You have a positive trade balance with us, you shouldn't do this."

Mr. RUSSO. What took so long in the fastener case?

Mr. HORLICK. Which fastener case, because there have been a lot of them. In fact, no new petition has been filed on fasteners while I have been there.

Mr. RUSSO. Part of the reason is that there has been so much damage to the American companies, there are not enough left for us to worry about. The foreign manufacturers now have the entire market as a result of a decision that was made by the Commerce Department not to move quickly.

Mr. HORLICK. The fastener industry did have an order outstanding involving fasteners from India, but there was no injury test. India then got an injury test, and because the fasteners were under GSP, the statute prohibited us from imposing duties.

Mr. RUSSO. There is a specific case that I will cite, but at the moment it slips my mind.

Mr. HORLICK. OK; we will cheerfully answer, obviously, and if there are any questions after that we will answer them in writing.

Mr. RUSSO. One other question. What kind of comments or suggestions would you make in determining the benefits a company receives, where governments establish targeting policies. For example, in the semiconductor industry where the Japanese establish a cartel. We all know the scenario.

The basic research and development was $132 million and the Japanese Government funded it all, yet it is spread out between five or six different companies. When you work it all down, you say, "What is $132 million," but if you were to use our techniques where every business carries out their own research and development, it adds up to a lot of money.

How do we deal with that, when we know that a country is targeting and they create cartels and provide antitrust; do you think we ought to factor in the fact that they wink when it comes time to apply antitrust laws, for example, in the area of semiconductors? The Japanese have done an excellent job of winking.

Mr. HORLICK. Targeting covers a whole range of things. We have looked at a lot of stuff about Japanese industrial policy. I mentioned that we have frequently countervailed a number of things which are classic aspects of industrial policy, including R&D subsidies, Government procurement, and a few other things.

Lax antitrust enforcement we have not considered a countervailable subsidy. I have some difficulty in seeing how to deal with that as a subsidy, not only under the code and under the statute, but indeed you would simply get into an argument over every nation's antitrust policy including, I hasten to add, our own.

The most important thing financially, in my view, of most Japanese industrial policy is import protection when they need it. If you gentlemen want to write into the law that high tariff rates are a subsidy, fine, we will countervail them, but just realize that someone is going to do it to our people.

The question of how you measure the subsidy, every case gets much fought over. I am well aware of the semiconductor industry's idea. When you have those five companies sharing that $132 million instead of one getting it, that one is also losing is exclusivity on patent rights.

Mr. RUSSO. There is no problem with trade secrets. When they make industrial targeting-policy decisions, trade secrets go out the window, which is something that doesn't exist in this country. They do it because they want to corner the market. Then they purchase within their own little cartel so that they are all dependent upon one another. I don't have to go through the scenario, you are sharp enough to know that. So far I am impressed with you, I think you know that.

Mr. HORLICK. You will cease to be soon.

Mr. RUSSO. I am letting you slip a little.

Mr. HORLICK. U.S. companies, obviously some of them have formed or are trying to form joint ventures on semiconductors. Without wishing to be nasty to any of our industries, as I mentioned, the Government has funded a lot of research made available to a lot of U.S. companies, and a lot of high technology stuff. A lot of foreign countries have pointed that out.

A lot of U.S. companies, quite frankly, don't want to participate in joint research. They want to do the research themselves and get the patent and 17 years' worth of monopoly. That is worth something. If we are going to start saying that $132 million is worth six times the $132 million, you had better have a deduction for the loss of monopoly rents that one company would get.

My basic point is this. Actually, what you are dealing with is an industry. This is not a small business that you are talking about. They are perfectly able to file a countervailing duty case on that. If we turn them down, they are perfectly able to sue us. If the courts think that this is what the law means, so be it.

Mr. RUSSO. What would it cost for that kind of procedure?

Mr. HORLICK. Several hundred thousand dollars. However, having said that, that is not the reason why they haven't filed a case. It is fairly notorious. Maybe I am wrong, but the rumor mill says that they haven't filed a case because there is a difference of opinion in the industry about whether they want to, because you have an industry that is, how should I put it, intensely multinational. One of its members produces semiconductors in Japan.

I know there was a lot of talk about it, but I never saw a hint of a petition because of that. But there is a procedure in the statute that if I am wrong and they are right, they can go to court and the court will quite happily say I am wrong. Congress foresaw that there would be differences of opinion.

I do want to assure you of one thing, though, Congressman, which is that we have not held back on countervailing anything or finding dumping because of foreign policy considerations, or they are nice guys, or anything like that. In fact, we have found subsidies against most of our major NATO allies, trading partners, or whatever, with a lot of unhappiness.

Mr. RUSSO. All the questions that we had with you earlier about reducing costs, you say there is no real to change procedures because it doesn't have to cost much money if people put their faith and trust in what you do.

Mr. **Horlick**. No, you still have to do it—I frankly would like you to reduce the cost to the Government, and a lot of the things we are proposing would reduce the cost to us as well as to petitioners and foreign respondents.

I don't expect people to trust me or our Government. They shouldn't. It is not our tradition. We get help from having the lawyers for both sides looking over our shoulder, looking at the confidential information, and telling us where we screwed up. Because we make mistakes.

Mr. **Russo**. But the small businessman can't afford it, as Mr. Jenkins was trying to point out. If they can't afford the kind of a lawyer that you are talking about, then their total reliance is on you.

Mr. **Horlick**. Yes. You get the justice you pay for, and it is not limited to this area.

Mr. **Russo**. They are paying taxes. I would suspect that they are paying a lot of taxes overall, that is a great deal of money being paid into the fund. Don't you think they are entitled to the best that they possibly can get for that money, and that is you.

Mr. **Horlick**. We give them the best possible, and our budget is $8 million more or less per year.

Mr. **Russo**. How many people do you have working for you?

Mr. **Horlick**. Two hundred and nine.

Mr. **Russo**. Your budget is $8 million?

Mr. **Horlick**. Yes.

Mr. **Russo**. Two people per case and you have 55 cases.

Mr. **Horlick**. We are overloaded. We have 55 current cases. We have 140 annual reviews, in addition to the 55 cases. We are also responsible for the foreign trade zones, statutory import programs, and some other things.

Mr. **Russo**. Thank you.

Chairman **Gibbons**. Mr. Pease.

Mr. **Pease**. Thank you very much, Mr. Chairman.

I appreciate your testimony, Mr. Horlick. I think that it has been very, very helpful.

I would like to start first of all by going to your testimony in which you say that "recently there has been a growing attention to different types of programs used by foreign governments that are alleged to be subsidies. Some claim that the countervailing duty law cannot handle these practices. This claim is unfounded."

I would like to go back again to the targeting which we discussed at great length with the Japanese. Do you feel that the countervailing duty law basically is capable of handling what is generally described as the targeting practices of the Japanese Government?

Mr. **Horlick**. No; to the extent that I am aware of them, for the following reasons: First and most important, the countervailing duty applies at our border. If the Japanese become a real threat in computers, it is not going to happen in the U.S. market. It is going to be cutting into IBM sales in Singapore, India, or somewhere else. The countervailing duty law can't touch that.

Without making too much of a pitch, I am a big fan of some aspects of Senator Danforth's reciprocity concept for that reason. It gave you some leverage on that third country problem. I should confess interest in this—I used to work for him.

The second reason it doesn't work is that a lot of things which in an economic sense are subsidies, the countries of the world have agreed not to countervail, and tariff barriers are the obvious example and I think the most important as you see in Japan.

The Japanese auto industry was built by keeping out foreign cars. Maybe U.S. cars wouldn't have sold there because they were too big, but you don't see any old Fiats or Volkswagens running around Tokyo either, and they were obviously competitive. You had years of import protection at 70 percent tariffs. That was the biggest single subsidy by far.

On a lot of the high-technology things, I think they are more sophisticated. One sees frequently the importing of U.S. technology until they are ready to build their own, and then closing the gates off. That is what matters.

What the Japanese's secret is, I will digress with a personal opinion, that within a regime of very firm import protection, they manage to keep a competitive internal market. Logically you would expect that import protection would lead to a flabby domestic industry. Instead they wind up with a competitive one even with loose antitrust laws.

The third reason why the countervailing duty law doesn't handle targeting fully is that you get into things like antitrust enforcement, or some sort of general aura that everyone knows this industry is favored.

Having said that, as I mentioned, we have gone after a number of the classic targeting practices, R&D in particular. We were stretching a point maybe, but we went after credit rationing, although not in Japan. People have not brought many countervailing duty cases against Japan.

We went after Government procurement in a couple of cases on the grounds that the Government was conveying a subsidy through high purchase prices. A subsidy is an economic concept and it can come through almost anything. The countervailing duty law hits a lot of them.

As I said, and I do get probably a little short tempered on the subject, a lot of the complaints I hear are from companies that haven't bothered to file a petition and they can afford it. Even if they know we are going to rule against them, they have every right to sue us and get a decision that we are wrong.

Mr. **Pease**. Would you go after, as you express it, the Japanese on joint R&D as opposed to single subsidies?

Mr. **Horlick**. Let me try to explain what we are doing on R&D, and there are some problems with it. Basically, where money is given for research and development and the results are made public, we do not find it a countervailable subsidy—I mean public to the whole world—on the theory that there is no benefit to one company over another.

There is one case, a steel case, where the R&D grant was used to buy a continuous caster, and that is not exactly research and development. We found that to be a subsidy. On the other hand, we have countervailed research and development money that only could help a particular company or industry, where availability was limited to people in that country, or things like that, even where it was given to several companies.

The problem comes in some of the fringe areas. I will be candid that we haven't had this case, but we haven't reached a firm idea either. Let's say a government funds research and development on something that flops that has nothing to do with the merchandise under investigation—remember that under the statute we have to find subsidies on that merchandise.

If the Japanese Government funds research and development on a missile, and a company also makes something totally unrelated to missiles, a clothespin, we are not going to find a subsidy on the clothespin. But let's say that the Japanese Government funds subsidies on how to make a clothespin out of water that flops. Arguably, they saved the company the money that would have been involved in R&D. I have heard that argument, but we haven't had that case yet. You get into real problems.

I might point out that the same argument will be made about all the stuff we fund. NASA puts out every year, "Spin Off 1982," about all the civilian uses—I am not knocking it—of all the products that have come out of NASA research, and they are very proud of it. They come to you and justify their appropriations on the basis of it. DOD doesn't put out a glossy pamphlet, at least not one I could find, but they spend a lot more money on the stuff.

If it is decided that we should go after all Government-subsidy money, it is fine with me. I don't think U.S. industry should have to compete with foreign treasuries, but I just return to the golden rule, it is going to be done to us.

Mr. **Pease**. Sure.

What about the argument that research subsidies at a very early stage may be critical to the development of a new product, and yet the product may not reach our shore until 6 or 7 years down the road during which time there has been an awful lot of additional money put into it, so that the initial subsidy represents a minuscule portion of the cost of the product and even if you countervail it doesn't do the domestic industry much good?

Mr. **Horlick**. As a matter of general principle, I don't have a problem with it. The general principle we have applied, against the screams of every one of our trading partners and the GATT code signatories, is that a countervailable subsidy should be measured in terms of the benefit to the recipient rather than the cost to the Government.

This is a huge argument internationally, and we have held firmly to the view that it is the benefit to the recipient, which is not always larger, by the way, but usually is. So if someone could actually document to us in some quantifiable, reliable sense what the benefit to the recipient really was, fine.

What we tend to get is one-sided views of that. The fact that $100 of R&D money led to something that led to a $5 billion industry doesn't mean that we should countervail $5 billion, because there are a lot of other things involved. Presumably, the company put in more money after that.

The obvious example is Xerox. This guy was sitting in his room in New York in 1938 and invented Xerox. He came up with the concept, and then went to the Battelle Institute and they put in $5 or $10 million and that was nice. Then he had to go to Haloid Corp., which became Xerox, and they put in many more million dollars before the first copier ever hit the market. Arguably, we should go after the cost of his hotel room if it was Government provided, because he was sitting there and came up with this idea, but a lot of people had to put a lot of money in it afterward.

I don't mind the general principle, but I want to do it fairly. We are not going to do it on one side of the story or another.

Mr. **Pease**. I think we all want to do it fairly, but if it is now being done in relation to the 64-K ram memory chip, or the 256-K ram or whatever, by the time our industry is deep sixed 5 or 6 years from now, the damage will be done. I think that it is that sort of situation that we are trying to address.

Let me move on a bit. You said in your testimony that you are concerned about using minor technical points to impede imports. The strong impression we got from our previous witnesses, as Mr. Russo mentioned, was that the Japanese did not mind in the least using minor technical points to impede our imports, but that the Commerce Department is above all that sort of thing. The net result is that our people do not get anything like the kind of consideration that a Japanese importer would get. How do you respond to that?

Mr. **Horlick**. It is my personal opinion that the Japanese do use a lot of minor points to impede imports. They have promised to reduce them. I would rather look at results than promises. That doesn't mean that the United States should do it. An obvious example, as you all saw, is the food costs in Japan. They impede imports and someone in Japan pays for that. We don't want to pay the price. For us to impede imports, it all comes out of some U.S. consumer's pocket at some point.

However, I do think we want to get the Japanese to quit doing what they are doing. As I said, that was my attachment to reciprocity proposals. I think that it is going to take a carrot as well as a stick to get rid of some of their practices.

Mr. **Pease**. When you say reciprocity, does that mean that you would support our doing it to the extent that they do it?

Mr. **Horlick**. Yes; in a very careful fashion. The danger is, and this is just a personal opinion, we have a very pluralistic, very democratic system. If you took a reciprocity system whereby if you do something to us we are going to do something to you, I have some skepticism that we would always do it in the right way rather than turning it into a tool for protectionism for the largest industries.

In our system, the industry of tomorrow has no employees, because that is tomorrow. The industry of yesterday has lots of them, maybe. This does not mean that I believe that there are such things as sunset or low-tech industries. One of our highest tech industries is growing soybeans.

I like a nondiscretionary system like dumping and countervail in part because it doesn't matter how big you are or how small you are. I recognize the problem for small business, but it doesn't affect the decisionmaking. That is not true of discretionary remedies, and I will not give examples.

Mr. **Pease**. Again, I want to turn to something that Mr. Russo mentioned. I was really struck by the testimony of our previous witnesses from the business field about their strong feelings that they do not have an advocate in the Commerce Department, that they do not have a neutral party in the Commerce Department, that they have an adversary in the Commerce Department.

As Mr. Russo said, you appear to be an eminently reasonable person, but the burden of the complaints that we have heard is that, first of all, it is the bureaucracy—which has continued through one administration after another—that is essentially hostile to their complaints.

Second, there is such an overriding commitment on the part of policymakers in the administration to free trade that the Commerce Department bends over backward not to accommodate our complainants.

Mr. HORLICK. Let me separate out the Commerce Department's administration of the antidumping and countervailing duty laws from all the other trade aspects. I can assure you that American industry, in which I include workers as well as businesses, has very strong advocates in the Commerce Department starting with the Secretary, and the Deputy Secretary, and the Under Secretary, all the way down.

There is a strong commitment by this administration, I like to think, to free trade, but also to fair trade. I can assure you that my marching orders from the Secretary of Commerce directly from day one were to run these things straight.

I am not an advocate for U.S. industry, and I would reject that role. I am not an adversary of them except in the following sense. Obviously, anyone coming to see me wants relief from imports. Congress in these two laws didn't say, "You get relief from imports." It said, "You get relief from unfair trade practices." I see myself as an advocate for them only in the sense of fully offsetting unfair trade practices, and in that sense being an adversary to foreign producers engaging in unfair trade practices.

Conversely, I am adversary to imposing import barriers against fair trade practices under these laws. If a U.S. industry comes in and says, "So-and-so is dumping," and we do an investigation to the best of our ability and say that they are not dumping, then, yes, I oppose giving relief under the antidumping law.

I think you will find in the list that we will send the chairman that the vast majority of our findings have been affirmative, that there is dumping or subsidization, not because we are tilting one way or another, but that is what we found. You will find a lot of U.S. industries saying that we didn't find enough.

I am considered adversary by U.S. industries who have said that I have refused to find that irrigation water is a subsidy, or cheap natural gas, or investment tax credits, I mean generally available investment tax credits. In that sense, I am an adversary. By definition, we are an adversary to someone when we don't give them what they want. Congress didn't say, "Give them what they want." It said, "Eliminate these unfair trade practices," and that is what we have tried to do.

I can assure you that the Secretary of Commerce has given us the fullest possible support on that. Obviously, on a number of these cases, we have been subjected to extreme political pressure, both domestically and overseas, and he has rejected it consistently. I have been very proud of our record.

I shared what I think was this committee's view in 1979, a perception that politics had entered into these cases too much. I don't think it should. This also means that it is a two-edge sword, and domestic industry is not going to get whatever it wants.

You will hear people testifying after me who will tell you that I am horrendously pro-Japanese. I don't see how my track record in the last 2 years would support that, but we didn't give them what they wanted.

If I may digress, I don't discount the importance of these trade laws, and we certainly enforce them to the best of our ability, but macroeconomic policies have far more impact—interest rates, exchange rates—than the trade laws, more than most unfair trade practices.

I think we ought to do whatever we can about Japanese industrial policy, but during the 1970's we were investing in housing because of inflation and our tax laws, and they were investing in productive equipment. That wasn't unfair of them.

Mr. PEASE. Would you repeat for me what you said before about the degree, if any, of influence by OMB or the State Department, or agencies outside of the Commerce Department, in your decisions?

Mr. HORLICK. Zero.

Mr. PEASE. Is there a consultative process that goes on?

Mr. HORLICK. None.

Mr. PEASE. None whatsoever?

Mr. HORLICK. None whatsoever. I talk occasionally, and they think not enough, with the USTR which also has some responsibility in this area because of the international implications. But under the statute, literally, I cannot show the confidential information to any other agency unless the persons involved give us permission. This has caused some distress.

I assure you, I do not consult with any other agency about what we should do on a case. In fact, I spend a lot of time making sure that they don't try to get in on it.

Mr. PEASE. I am probably past the end of my time, but let me ask just one more question.

Mr. HORLICK. Let me add, I have to tell a lot of agencies what I have done, but I don't seek their advice on cases, and I can't pay any attention to it if they offer it.

Mr. JENKINS. Would the gentleman yield?

Mr. PEASE. Yes, I will be happy to yield.

Mr. JENKINS. Do they attempt to contact you?

Mr. HORLICK. Yes, every so often some agency or another, including within the Commerce Department, gets lobbied by someone, not always by foreigners, and says, "Why don't you do something." I am polite and I tell people what we are doing, but I can assure you that we don't seek their advice and we don't take it, with the sole exception of USTR with respect to the GATT codes and what they think applies.

Mr. JENKINS. The USTR doesn't tell you how they think you ought to go on issues?

Mr. HORLICK. No.

Mr. JENKINS. They never do?

Mr. **Horlick**. They ask us to check to make sure that we are consistent with the codes. I have a very cooperative relationship with both the past and current general counsels. They are both very good friends of mine. I don't want to seem adversary to them, but I have deliberately set out to create the sense that these two laws are not part of an interagency process, unlike the others.

Mr. **Jenkins**. I could imagine one of these people from USTR on occasion saying, "This would be disastrous to this Nation."

Mr. **Horlick**. People from all agencies do that, on both sides, domestic and foreign. It is not relevant. It is not in the statute. I want to say that the Secretary and everyone else has backed us up on that 100 percent.

Mr. **Jenkins**. I am sorry to have interrupted you.

Mr. **Pease**. I am happy to have your contribution.

We talked before about the 45 days that the International Trade Commission has to make preliminary finding of injury, and the 5 months that you have to make you preliminary finding. Do those two periods run concurrently?

Mr. **Horlick**. Yes.

Mr. **Pease**. They do.

Mr. **Horlick**. All timeframes are from day zero, which is the day of filing of petition.

Mr. **Pease**. The last question, then.

What do you think of the concept advocated by some of my industry people that we ought to declare in the law that subsidies or dumping are illegal whether or not injury is caused to the domestic industry?

Mr. **Horlick**. To some extent, I will defer to the International Trade Commission on injury. I never look at injury, except that I have to see that there is some evidence of injury in the petition and evaluate the quality of that evidence.

First of all, it doesn't make a lot of sense to impose a barrier if there is no material injury to U.S. industry. What they are saying in essence, I think, is that the ITC is failing to find injury when it is there. If there is no injury, why are we depriving U.S consumers, which frequently includes manufacturers of an end product, of the lower price?

Second, again, this is very much a matter of what was negotiated in 1979, and in 1947 for that matter. We gave the injury test in return for some other things. I didn't make that particular bargain, but it is a deal. You give something, you get something.

I can give you some very specific examples because we don't give the injury test to everyone. We had 13 cases against Mexico in the last year. People claim there is a subsidy. We find the subsidy, and we put on the duty. As a matter of policy, you might want to tell me, "Why, when Mexico is in such horrible trouble, do we want to screw up all their exports?" That is a policy decision, and it is not one I make. I just go ahead and find the subsidies.

If you didn't have an injury test, you would have countervailing duties against most of the world and they would have a lot against us because we do subsidize a number of things. That was a decision that the world's trading people made in part just to reduce the number of countervailing duties, I would guess.

Mr. **Pease**. Would it be a violation of our GATT obligations if we removed the injury test?

Mr. **Horlick**. Yes, clearly.

Chairman **Gibbons**. As I recall, and you can help me on this, in order to get other countries to sign the subsidies code, we adopted the injury test. Mexico is not a member of GATT and it has not signed the subsidies code. Therefore, it gets no injury test. There is one exception to this, as I recall, and that is India.

Mr. **Horlick**. They have joined the code now.

Chairman **Gibbons**. They have joined the code.

Mr. **Horlick**. Yes, after much fuss.

Chairman **Gibbons**. Essentially we changed our own countervailing duty laws which did not require any injury test. In the Tokyo round that was negotiated away to the countries that would sign the subsidies code.

Mr. **Horlick**. I fully agree, and I might add that it was also vis-a-vis the Congress, in return for giving up the injury test, these laws were made nondiscretionary. The simple fact is that since we gave up the injury test, we have had a lot more countervailing duties applied than before.

Chairman **Gibbons**. Pardon me, if you will excuse me.

Mr. **Pease**. Sure.

Chairman **Gibbons**. I think a lot of the problem is that we are still getting some pre-1979 complaints here in the committee, or let's say pre-1980 complaints here in the committee because some of those things are still pending and are still bouncing around. It has been refreshing to hear you discuss the countervailing duty laws as you have.

Mr. **Horlick**. I have no problem with the basic point. U.S. companies shouldn't have to compete with governments. They should have to compete with industries.

Chairman **Gibbons**. What I want to ask you to do is to please cooperate with this committee to find ways that we can make these laws work more effectively and see everything that we can do that is not a violation of our obligations under the GATT or the subsidies code.

I don't challenge your loyalty, your patriotism, or anything else. In fact, it is obvious from the way you have handled the questioning that you are a very well informed witness, and if it is going to work, we need your help.

Mr. **Horlick**. This is for the administration—you certainly have our commitment all the way down the line to work on that. We have talked with staff here, which has been very helpful also. We definitely want to do this, and you have our full commitment on that.

Chairman **Gibbons**. Let me ask you about the steel cases now, because that worried me, not the way you handled them, but the way they were finally settled.

I kept urging the steel companies and I kept urging everybody that listened to go all the way. If the Europeans are subsidizing, why did they end up with a little slap on the wrist, which is about all we did. What happened?

Mr. **Horlick**. This will definitely be my personal opinion.

Chairman GIBBONS. Go right ahead, you are very refreshing. I am glad to hear you.

Mr. HORLICK. I am aware of your concerns and I was aware at the time. The Commerce Department did go all the way. We made final determinations of subsidies. My view of what happened is that the Congress in 1979 passed laws which were non-discretionary, which gave U.S. industries rights. The U.S. industry can force the U.S. Government to do something even if for policy reasons the U.S. Government doesn't want to do it.

Chairman GIBBONS. That is right, and that was done deliberately.

Mr. HORLICK. Right.

What happened in steel was that the U.S. steel industry saw that by using those laws, they could force the U.S. Government to do something to certain European countries, in this case France, Great Britain, Italy, and to a little extent Belgium, that those countries would dislike strongly, namely, high countervailing duties. We found rates of 15 to 20 percent, which would knock those countries out of the market. The industry could force us to do something to those countries which would force those countries to put a lot of pressure on us to negotiate quotas that the U.S. industry wanted, and that the administration didn't want.

It sounds like a Rube Goldberg device, and it is. That is exactly what happened. The administration was the only person in that game, and the Congress, that didn't want quotas. The U.S. industry wanted quotas, and the Europeans wanted quotas. The obstacle was President Reagan. Through using these nondiscretionary laws, the industry couldn't force us to quotas because we were willing to enforce the [illegible] trade laws. I have no doubt that you the Congress would have [illegible]ed us up in enforcing them rather than putting in quotas.

So the [illegible] had to find a way to force us to quotas, and the way to [illegible] was the leverage they had with these laws on countries which were terribly important to the security of the United States. This is an industry which always said that it didn't want foreign policy considerations in the antidumping and countervailing duty laws, and it used the foreign policy considerations to avoid the application of them.

The downside for the industry, of course, was that we found that some of the countries were not subsidizing at the time. They have, of course, challenged that and they claim that everyone was subsidized. I would point out, since I am getting adversary now, one of the allegations was that the Dutch were subsidized because they used investment tax credits, which is a horrible thing to do.

By the end of the steel case, I was considered adversary to everyone. But the essence of it is that the reason you had quotas was not as a protectionist device, but really because both sides wanted them and through the laws could force them on a very unwilling administration. The unwillingness is proven by how long it took the administration to be willing to even talk about them.

In the meantime, we spent a lot of time doing cases. We did everything that Commerce does on a countervailing duty case except to sign the final order, and we had that ready to go. Indeed, the only reason you had what I consider a successful quota negotiation was that both sides knew that if they didn't agree, we would go ahead and enforce the law, and that meant both sides had something to lose.

What you see in the United States-European Community agreement, basically, is the same results as if you had applied the duties, but spread differently within the EC. If you had applied the duties, you would have had much lower imports from France, Great Britain, Belgium and Italy, and much higher imports from Germany and the Netherlands, which weren't subsidized.

What you have with this arrangement, was that because of the nature of the bargaining, basically, everyone made their own estimate of how much impact that would have, and then the European spread the impact among themselves. I am not proud of it as an example of U.S. free trade policy, but in terms of the mechanics it was very much tied to these laws. The timetable of the negotiations for the quotas, the nature of the quotas, indeed the very size of the quotas, were set by our application of the antidumping and countervailing duty laws. That was the whole bargaining parameter. It was very much a rule driven negotiation rather than a power driven negotiation.

Chairman **Gibbons**. I am still not happy about the way things came out, frankly. I think we have to deal with the subsidy practices, if we don't the subsidy practice are going to be more pernicious to deal with than were the tariffs that so haunted the planet during the 1920's and 1930's. We are creating a bigger monster, rather than a smaller monster, and that is why I want to concentrate on these subsidies.

Mr. **Horlick**. I think you are right. One of the nice aspects of the unfair trade laws is that when a subsidy or dumping ceases, the import barrier ceases, so you keep trade undistorted. With these informal arrangements, it is very hard to stop them once they start.

Mr. **Jenkins**. Under this arrangement, the subsidies were taken care of by quotas.

Mr. **Horlick**. Yes.

Mr. **Jenkins**. If you had a party that was not a steel person, but was part of the original petition, suddenly now they have a quota.

Mr. **Horlick**. The theory of the quotas is not that they eliminate subsidies, but that they eliminate injury. An independent producer or indeed anyone, any worker or producer, can file a petition today claiming subsidies and injury. They would have to prove their case. They wouldn't have a lot of trouble proving their case on subsidies, because we have already done all the work for them. They would have to show injury, and frankly it would be very difficult, I would hope to show injury on stuff that is already covered by a very severe quota. But someone could file a case. I don't think that it would be very popular with the U.S. industry because the Europeans would have the right to destroy the arrangement.

Chairman **Gibbons**. In effect, part of the steel industry that had the administration's ear got its wish, and the other part got shafted.

Mr. **Horlick**. No comment.

Chairman **Gibbons**. OK.

The burden of proof, I realize is a tough one and the lawyers will argue about that forever.

Mr. HORLICK. Let me describe it in practical terms rather than legal terms. The legal terms are not strictly relevant because we are not subject to or part of the Federal court system, and we are not subject to the APA by specific congressional provision.

What happens in terms of burden of proof is de facto a shifting. To start off, to file a petition, there is a very light burden of proof on U.S. industry. The petitions we reject are where they contradict themselves, or they leave out crucial information.

There is a very low burden of proof to be met there. It it is significant because that is what Congress put in the law, and specifically for small business they have said "whatever is reasonably available." We have initiated on some very thin cases.

The next step is that we send out our questionnaire. The questionnaire asks questions about all the alleged subsidies or dumping. Immediately there is now a burden on the foreign producer to come up with information.

The burden is on the foreign producer to tell us about his business. They fulfill that burden and they send us back a questionnaire response. I am not kidding myself. Obviously it is the most artful one that they can come up with. The burden then shifts to the Government to try and sort out what they are doing. As I said, we send out people to look at their books.

It also does shift somewhat to the U.S. industry to make sure that we do our job right, but essentially the burden is now on the Government. The burden continues on the Government to the end, because our decision has to be supported by substantial evidence once both sides have come forward.

The U.S. industry has to come forward with a little evidence for the petition. The foreign entity comes up with a lot of evidence to show what its picture is, but we have to make sure there is evidence. In practice, the burden is on us, and both sides, of trying to pick holes in what the other is up to.

If the foreign entity doesn't supply satisfactory information, we have been very heavy handed about using the evidence in the petition. The reason why you have not heard more screams from overseas is that they do the same thing in administering their laws, so they can't scream when we do it.

Chairman GIBBONS. Is there any way that the countervailing duty and the antidumping statutes could be improved to where they would equitably distribute the burden of proof, or does the statute speak to that?

Mr. HORLICK. I think it speaks to it in the ways that I mentioned, in terms of the petition and the standard of evidence, that is an implied burden of proof. I frankly think that the burden is reasonably fair. What you are getting is people wanting to tilt it in favor of the U.S. industry. For example, in the extreme case, they would want a foreign industry to prove that it isn't subsidized, to prove a negative, which it is very hard to do.

I frankly think that the burden is fair. What you are seeing is people complaining because we have made the wrong decision in their view and we are being adversary to them. I don't think that the problem is one of burden of proof. Obviously, if we had five times as many people, we could do five times more of an investigation, but that is not realistic.

Chairman GIBBONS. That is one of the things that I want to get to this morning. I apologize, we have had you talking now for 2 hours, and you have talked very well and very convincingly.

I was reading over the weekend Mr. Stewart's testimony, and he opens his testimony by saying, in effect, that you are hardworking and you are good people, but you are just badly undermanned. What is your response?

Mr. HORLICK. Obviously, we all favor less government, except when it helps us. We have 209 people. Treasury allegedly had 70, but the actual head-count was considerably less. So you have had a tripling in the size.

Chairman GIBBONS. As I recall, they never decided any cases with that 70.

Mr. HORLICK. There is a lot to that. The dumping, they had to. The countervailing duty they could duck. At the same time, you gave us a lot more work. Treasury simply did not review old cases. We do. There goes a lot of our resources. Second, a lot more requirements were added. For example, having judicial review takes time. Having access to confidential information takes time on our part.

Obviously, I would love more people. Obviously, everyone above me and OMB will never forgive me for saying that. We have more than we had before, but we never have enough.

The other problem, of course, is that right now we have probably staff enough for a normal caseload. The problem is that we are at the bottom of the business cycle, and when business is bad you get a lot more work for a couple of reasons. People don't like imports, and also it is easy to show injury as a technical matter when the economy is bad. If the economy is booming and your plant is running at 100 percent capacity, you can't show that imports are hurting you.

Our caseload now is higher than it ever was in the 1970's. Last year's caseload, obviously, was the highest in history by a factor of four. We had a 600 percent increase in cases from 1981 to 1982. That was stretching it.

Mr. Stewart is kind in saying that we are hardworking and conscientious. I am sure he will have some less kind things to say. He has a legitimate point of view to advance, but I think that we are balanced.

Chairman GIBBONS. First of all, granting that all developed countries practice some form of targeting at one time or another in their career, some with less government intervention than others, and some for different purposes, such as national defense and things of that sort, the man on the moon and all of that.

Mr. HORLICK. Right.

Chairman GIBBONS. Would it be productive if somehow we had enough people to take on these targeting matters as soon as they begin?

In other words, as I see it, Japan has come as close to perfecting the targeting operation as anyone so far. Their success in that field is going to spread and is spreading to Korea and to other countries, Central and South American countries, countries in Europe, and everywhere else.

One of our problems is that every time we have a case, we have to develop the information. Could we productively spend some good investigative hours as soon as a country begins to target?

Mr. **Horlick**. We are very concerned about targeting, as you know. You have heard it from the Under Secretary. Targeting per se may not be the most important thing going for the following reason and only for the following reason, it will not always work right.

Chairman **Gibbons**. That is right.

Mr. **Horlick**. The European steel industry was a targeted industry and it is a disaster. The $35 billion that the West European countries have spent on their steel industry wasn't invested in something that would have been better for them. This is the seamless webb, and we have probably benefited in some areas from all the money they pumped into steel, even though it hurt our steel industry, which it clearly did. The Japanese have done an extraordinary job in some industries, not all industries, of targeting.

Chairman **Gibbons**. Correct.

Mr. **Horlick**. It is a concern when they target. To me what targeting means is artificially trying to shift comparative advantage, and there is clearly a problem there with Japan. I think the most important single thing is an open market in Japan, because they can target all they want, as long as we can sell the same things there.

The Japanese Government doesn't have a lot of money, it is a very tightfisted outfit. You were just there, and I don't know whether you went in many offices. Let me put it this way, they are more crowded than congressional staff offices.

If we could get into the Japanese market from day one of a product, the targeting wouldn't be as much of a problem. It is that they get to build these industries with government assistance behind that protection, and I think most of the people who are complaining to you about targeting will tell you the same thing.

The semiconductor people would tell you that they wouldn't have to worry about Japanese semiconductors if they could have sold there, because there wouldn't have been any. One hundred and thirty-two million dollars, no matter how well-spent, wouldn't have had a chance. Texas Instrument had to fight tooth and nail to get a chance to sell something there, and they have been very restricted.

It is something that I don't think the countervailing duty law will handle perfectly. Even if we investigate in advance, we still have the injury problem. More important, the problem is a worldwide one. The marginal cost of a semiconductor is small, which means that you have to make a lot of them to recover your research and development costs. That means that you have to sell all over the world.

The semiconductor industry is hardly unsophisticated. I have great respect for them. What they are coming to you and telling you is that they want zero tariffs around the world. They don't want to close off the U.S. market. What they want is into the Japanese market. They also want no unfair trade from Japan or anywhere else.

Chairman **Gibbons**. What it looks like to me is that the whole process of targeting, which involves other steps, means protection of your domestic market while you target, while you develop your product. If we defined it properly, would it be a countervailable operation?

Mr. **Horlick**. The protection of a domestic market, I am just reluctant to countervail, crudely, because we do it. Any industry with high tariff rates here will oppose us countervailing. Any industry that exports that has high tariff protection here would oppose that.

Chairman **Gibbons**. We have some industries with high tariff protection because historically they have had them, but we have never had a program of targeting within those industries.

Mr. **Horlick**. I know.

Chairman **Gibbons**. What I am saying is that the combination of targeting accompanied by an artificially high tariff barrier then becomes a bounty that is reachable under perhaps changes in the law that we could make.

Mr. **Horlick**. I think that you would have to change the law. Again, I think, before doing that I am wary of what the Europeans would do to our exports. They would countervail our tariff barriers. Textiles which have a high tariff rate here, in particular would be the ones to bear the brunt. The Europeans don't like us sending textiles there. They would say that we are targeting in some way or another. That is a balance that Congress has to strike.

Chairman **Gibbons**. In the Japanese process, as I understand it, they actually pass an act of the Diet.

Mr. **Horlick**. I am sure that we could define it, but others would find their own way of getting at it.

I am not defending the Japanese in any way, shape or form.

Chairman **Gibbons**. I am just trying to get information from you.

Mr. **Horlick**. I am not sure, but I think it would be hard to it under countervailing duties. Again, even with countervailing duties, you don't hit those crucial third markets.

Chairman **Gibbons**. I understand that you can't get third markets, but you can make that practice so unattractive, just because of the size of this market, that people will refrain from using that technique. If they can't get into this market, getting into other markets probably is not that attractive to them.

Mr. **Horlick**. If the price of semiconductors in the United States rises, it is going to make our computers less competitive internationally, I am sure you all know that. Again, my own personal preference is not to rewrite the countervailing duty law to take care of it with something like reciprocity legislation or 301.

At some point, the whole nature of trade policy and opening markets is using our market as the carrot that forces other people to open their markets. There is nothing novel about that. That goes back to 1934 and Cordell Hull. But it is a very difficult problem, and one that is a very important concern for this administration and the Congress. We have seen foreign governments artificially shift comparative advantage through a complex set of processes.

Chairman **Gibbons**. We appreciate every effort you and the rest of the administration can make in helping us sort out this problem. We obviously have a very complex problem that is perhaps not as important as international monetary policy, but it is very important as far as competitive advantages are concerned.

Mr. **Horlick**. I fully agree.

Chairman GIBBONS. Are there questions of Mr. Horlick?

Mr. VANDER JAGT. Mr. Chairman, I just want to congratulate the witness on a very excellent job. I have enjoyed the dialog with my colleagues. I particularly enjoyed your conversation with Mr. Pease about the fact that you don't exactly consult with the State Department in making your determinations.

When we wrote the law in 1979 setting up the countervailing-duty remedy, we went to great length to try to insulate you. It is very refreshing to see that you are carrying out not just the letter but the spirit of the law in not letting foreign policy considerations intrude on the objectivity of your findings on the basis of the facts.

Mr. HORLICK. I have probably lost all my friends in other agencies from what I have said here. I was in private practice at the time, and it was my reading of the overriding concern of the Congress. I assure you that it has been our overriding concern.

Mr. VANDER JAGT. I think that this subcommittee had a great deal to do with putting that in.

Mr. HORLICK. Definitely.

Mr. VANDER JAGT. I am glad to see that it is working out.

The witness has been here long enough, Mr. Chairman, and I only want to ask one question.

Can you think of any case in the 2 years that you have been there where your finding or your determination would have been different if the petitioner had not had legal counsel? Can you think of a single case?

Mr. HORLICK. Yes, there have been some.

Mr. VANDER JAGT. How many, roughly?

Mr. HORLICK. A lot of them would be different by little amounts. Significant differences—this is off the top of my head and I am not going to identify them—I can think of one. Dumping cases, it is hard to say. I am thinking of countervailing duty cases, because in dumping cases there is a morass of numbers.

Mr. VANDER JAGT. The countervailing duty cases are the ones that I was asking about.

Mr. HORLICK. At least one. Not the steel cases, oddly enough, and not the subway car case.

Mr. JENKINS. This is a terrible blow to the legal profession. [Laughter.]

Mr. HORLICK. There goes my other set of friends.

Chairman GIBBONS. And the economists.

Mr. HORLICK. Yes.

I can think of a couple at least. There is no question that it makes a difference.

Mr. VANDER JAGT. The couple of cases that you can think of, are they cases where there is a little bit of difference or a significant difference?

Mr. HORLICK. A significant difference. It does make a difference.

Mr. VANDER JAGT. Thank you very much.

Mr. SCHULZE. Mr. Chairman.

Chairman GIBBONS. Yes.

Mr. SCHULZE. If I could follow up on your line of questioning very briefly.

Gary, do I understand you correctly that you think the best way to look at targeting, or approach a remedy to targeting, would be through reciprocity legislation?

Mr. **Horlick**. That is my personal opinion, but you would have to safeguard it so that it wasn't used for purely protectionist purposes.

Mr. **Schulze**. Thank you.

Chairman **Gibbons**. We will have to figure out how to do that.

Mr. **Schulze**. It does make some sense to me.

Chairman **Gibbons**. Yes.

We have a quorum call, so this is a good time to stop.

[Whereupon, at 12:10 p.m., the subcommittee recessed, to reconvene at 1 p.m.]

AFTERNOON SESSION

Chairman **Gibbons**. Mr. Ervin, why don't you go ahead and proceed. Let me apologize to you for the long time we took with Mr. Horlick this morning. Please go right ahead.

STATEMENT OF CHARLES ERVIN, DIRECTOR OF OPERATIONS, U.S. INTERNATIONAL TRADE COMMISSION

Mr. **Ervin**. Thank you, Mr. Chairman.

As you know, the United States International Trade Commission administers, as a partner with the Department of Commerce, certain aspects of title VII, which relate to countervailing duty and dumping.

Specifically, the Commission has the problem of determining whether an industry in the United States is suffering material injury or is threatened with such injury or that an industry is being prevented from establishment by reason of the alleged unfair acts of either dumping, or by subsidies, bounties or grants.

The Department of Commerce, on the other hand, has the responsibility for determining whether or not a subsidy exists or a bounty or a grant, or how much if any less than fair-value sales have occurred.

I have a full statement, which I request the chairman include in the record. In that I do make the point that I fully endorse the statement made by the Chairman of United States International Trade Commission presented to your committee on March 16, 1983. All of our senior staff participated in and assisted the Chairman in developing the positions that he took in that statement and endorse them.

Chairman **Gibbons**. We will put your entire statement in the record, and you just proceed as you wish.

Mr. **Ervin**. In my statement, which I would like to summarize extemporaneously, the Commission effectively conducts two separate investigations.

In the first of these, it has 45 days in which to determine preliminarily whether there is a reasonable indication of an injury. This investigation represents the following major steps:

First, we receive a petition. We normally have 1, 2, or 3 days to read that petition and understand precisely what it is the industry is complaining of. The petitions range from being relatively easy to understand to enormously difficult.

As a case in point, the carbon steel petitions, which ultimately were determined to have 93 cases, had 3 million pages of text. I repeat we have 3 days in which to read what the complaint is.

We, therefore, had to go through 3 million pages of text in order to determine the articles which would be the subject of the investigation. We had to do this in 3 days in order to design a questionnaire.

The questionnaire has to gather information from the domestic industry, which normally the industry is not itself able to supply us. The information consists of domestic shipments, sales, the evidence of lost sales, specific illustrations of pricing of product, and the profit and loss experience of each individual manufacturer on the product line of which he is complaining.

If such information were shared by the industry, there is the possibility of an antitrust violation. Thus, the very core of the investigation is not normally contained in the petition. In my view, it was not contained in the 3 million pages that were submitted as the petition in the major steel cases.

We have to assemble such a questionnaire and, where we can, field test it. In the case of the steel cases, we had a questionnaire that was 250 pages, and only typing it took 3 days.

In the 3 days in which we were typing it, we had the following major events, which will illustrate the fact that we are dealing in real days and not in work days.

On the third day we had the heaviest snowstorm in the history of Washington, and one part of the Federal Government announced to the rest of the Government that it had closed down. However, since Congress did not provide us an exemption from the calendar when the rest of the Government closed down, we continued at work.

The following day, you may recall, the flight of Air Florida crashed into the Potomac River and Washington, D.C., was essentially shut off from Virginia. We had no exemption from time for that either.

The third day on which this questionnaire was to be completed turned out to be Martin Luther King's birthday in which the District of Columbia essentially announced that our clerical staff should take the day off as a holiday.

On the seventh day, we mailed a questionnaire of 250 pages, 100 copies. We received back on the 26th day the responses to that questionnaire which we estimated to have 265,000 pieces of information all of which had to be tabulated.

It was tabulated, and at the end of the 31st day we delivered to the Commission an 875-page report of the economic conditions involving 93 separate cases divided by nine countries and seven products.

It was a work of such a magnitude that I honestly believe no one else in the Federal Government could ever have accomplished it. We immediately went to trial on those cases. The suits have lasted a year and a quarter on what was done in 31 days. We have not yet had a court decision.

This was, of course, a bizarre illustration of the effort, but the effort includes more. There is an opportunity for the public to come forward and there is a conference, which I direct, in which the parties have an opportunity to present oral argument.

Quite frankly, as Mr. Horlick observed, the petitioner is prepared. He is ready. He has thought about his petition. He has thought about his argument, but those opposed to the petition are frequently unprepared. So a great part of the public hearing is to give the respondent, who is frequently choosing counsel a day or two days before the public hearing, the maximum opportunity to state his or her case.

A hearing normally occurs on the 28th day, following which there is an opportunity for brief from the parties. These briefs normally also arrive at the Commission's desk on the 31st or 32d day of the investigation.

You will notice always the reference to "day" in my comment because every day has a distinct meaning when you are attempting to do a complete industrial analysis in such an extraordinarily tight time schedule. No day can be missed nor was missed. In the 4 years that I have held my job, the Commission has never been late by 1 day.

After completing the Commission's determination in the preliminary stage, another period begins. Normally the Commission is taking no action during this period. This is the one Mr. Horlick referred to as the one in which the Department of Commerce conducts its investigation to determine whether there are bounties, subsidies, or grants, or whether foreign producers are selling within the United States at less than the cost of production.

After Mr. Horlick makes a preliminary determination, we normally begin our final investigation. The final investigation includes elements that are repeated from the preliminary case. Normally, obviously, you have done a great deal of work which is extremely valid. But in the final investigation, we have that most priceless of all qualities, time.

We now can go back and try to determine whether we were correct in determining what was the industry that was directly competitive with the imported article. We also have the opportunity to examine more completely the profit-and-loss statement that was submitted to us.

Quite frankly, many firms do not know what their profit-and-loss experience is by article that they produce. They know what it is pretty well by firm. But in heterogeneous product-manufacturing facilities, they normally do not know what every individual product cost is. They use a standard cost system which rather loosely allocates expenditures.

I have personally had the opportunity of auditing one manufacturing firm which was represented by one of the counsel who will appear before you later today. He was frightened of what I might find. What I found was that he was grossly understating his injury.

The way the expenditures were allocated was not the most favorable to him, because the firm does not necessarily go back and try to reconstruct profit-and-loss experience for a specific product. We have time to do a more complete P&L analysis.

Another example of something that we do in the final case that is critical deals with the evidence of lost sales. It is normal for customers in the United States to answer a question, when asked by a salesman, "Why didn't you buy from me," to come up with an answer like, "I bought from the importers," just to get them riled a little bit or, alternatively, to give the argument that they bought for some reason other than price—reliability, quality, maintainability, or some other product feature.

It is very difficult for us to go back and try to verify the reason for an article actually being sold. Some of it is just to protect sources. Responses are given to us in order that the importer is not kept out of the American market, or that the domestic firm won't have to pay a duty in addition to the selling price. There is an element of that.

There is also an element of confusion where the person who is responding to our call doesn't really remember exactly why they did something 6 to 9 months ago. There were many factors in their mind that were not fully documented. Sometimes they are fearful that in some way or another they are going to be involved in a legal proceeding over a matter in which they have no interest.

It takes time to work through these to determine whether or not the article that was sold in the United States was really sold on the basis of the underselling which was caused in substantial part by the unfair act. So we use the time for all of these improvements in our final product.

The Commission also conducts a public hearing in the final investigation. I conduct it in the preliminary, the Commission does it in the final. There is for that public hearing a prehearing report, which is prepared by the staff and which states what the staff has found out, which allows the parties to focus on the information which the Commission has before it for purposes of rebuttal, argument, or discussion.

From all of this, the final questionnaires, the final staff report, the argument and the public conference, the public hearing, the briefs that are submitted from the parties, the Commission must make a decision. The volume of information before the Commission is sometimes enormous. It can be measured in feet.

It is, therefore, necessary for the Commission frequently to have a briefing from the staff, either privately in their office or publicly, where the staff attempts to focus on the issues that seem to be most relevant to the staff.

The Commission, having made its decision, must state its reasons. Unlike many of the reasons which are stated sometimes by the President for his reasons for doing something which is contained in a page of a press release, the reasoning stated by our Commission must be complete, must be fully documented to the record, because that statement of reasons will be examined by at least one of nine judges in the Court of International Trade for purposes of relevance, germaneness, and it can be challenged on the grounds of being arbitrary, capricious, or whimsical, if it is not based completely on the record, with record citations given. Therefore, the drafting of opinion, or the completion of this argument, is one of great art and a substantial burden to both the Commissioners and most of the staff.

We complete this work, and essentially we have had 45 days at the beginning of our case to do preliminary determination of reasonable indication of injury, and only 45 days after the final act of the Department of Commerce to make the final determination of injury. After those very time compressions, we then have the court review procedures which can literally last a year or more.

A number of questions were asked. I am not sure if it is appropriate for me to try to answer any of these questions at this time. I will be happy to do so.

Chairman **Gibbons**. Please go ahead and go through them. It will save time.

Mr. **Ervin**. I know you, Mr. Chairman, first asked the question of Mr. Horlick of whether targeting could not be included as an unfair act under the countervailing duty laws. He responded, at least preliminary as I understood his position, he thought they could not.

As you are well aware, you have given us a special study under section 332 to do a general economic study of targeting, and we obviously have the problem of trying to define what targeting is and how you can try to prove targeting. We hope that we can give you some opinion on this matter. We cannot today.

I would suggest that the committee consider, while it is waiting for our report, as well as considering other matters, the possible use of statutes that were originally intended for another purpose, namely, section 406 of the Trade Act which now deals with nonmarket economies.

It is possible that it will be conceived, after thorough examination, that some organization like the Commission could be used to examine all the surrounding circumstances of a country's acts, which can be very complex and very debatable in their impact.

Some organization like the Commission could make a reasonable indication that this constituted targeting under an act, and that it might also say that this gives the threat of market disruption.

As a result of this, such a body as the Commission might then be able to make a recommendation to the President on what to do about it, if the countervailing duty statutes, for the reasons that Mr. Horlick gave today, were not directly usable.

You, Mr. Chairman, and I believe Mr. Schulze, and I know one other member of the committee, were interested in the problem of dealing with nonmarket economies. What do you do about systems in which you can get no cost of production information whatever, these being nonmarket economies, or whose basic policies are to support with subsidies, bounties and grants, the production of exports. How do you deal with them?

Obviously, we have this preposterous idea, which Mr. Horlick was quite frank to admit is laughable and we all understand it, of trying to select another country at a similar stage of development, and use that country as the country surrogate for the cost of production, and try to get from that country what the costs of production are.

This produces the result that we saw in menthol, using Paraguay as a substitute for China, we admitted this made no sense, or using, in the famous golf cart case, Canada for Poland for the cost of production. As Mr. Horlick said only moments ago, you can come up with any number you want.

Is there a solution for applying fair trade to nonmarket economies? That is the basic question. I sat in a meeting approximately 4 years ago with 85 people, all seriously concerned about the trade laws of the United States, discussing this question, and there was no real answer that was developed in 2 days of meetings.

There have been, however, only nine cases filed under the statute which was intended to deal with the question of nonmarket economies, where you were not dealing with countervailing duties and dumping, section 406.

It is conceivable, as a practical matter, that you cannot apply countervailing duty and dumping to nonmarket economies. What we must do is to revise section 406 to make it more usable and to give a message to the bar that it is a more necessary part of trade problems that relate to those products from that origin.

In the Chairman's statement, which I referred to and copies of which I made available to the members in the pack of information which I made public, the Chairman and the staff did make a few suggested revisions in the portion of countervailing duty and antidumping laws which we administer.

First, in terms of judicial review, as Mr. Horlick has commented, the ability to sue the Commission and/or the Commerce Department at any point in the proceedings is a burden for the Commerce Department. It can be a burden for the Commission only where the Commission finds in the negative.

Therefore, we can defend our actions successfully there, or at least if we can defend our actions, after we have found in the negative, it is not an unnecessary burden. It is not a burden which is causing us to constantly be distracted from the normal course of our work. Therefore, judicial review is a problem, but it is not one that is impossible for us. We have 31 active cases today.

In the comments made by our Chairman, he suggested to the committee the possibility of giving instruction to our commissioners on whether or not to use cumulation in dealing with injury.

The doctrine has this problem. If there are 17 countries, each of which is sending into the United States only 1 percent of the total consumption of a specific article, no one of them means very much. Then it is quite easy to find in the negative.

Does the Congress intend that we accumulate across all of the countries which might be exporting goods into the United States? We on the senior staff have discussed this matter, and we feel the instruction is adequate, that in effect the Congress has instructed the Commission to use its own judgment.

Nevertheless, the Congress may wish to examine this question. I am sure members of the bar will advise the Congress to do so, to state clearly whether or not cumulation is mandatory or strictly optional.

Another issue contained in our Chairman's statement, which is a possible revision in the law that would help us, deals with a debate which is currently underway between our commissioners and general counsel. It deals with the question of whether in the final case the Commission should consider in causal connections between the unfairly traded articles imported into the United States, the margins that are found by the Department of Commerce in their work.

We would be happy to work with your staff in order to further discuss the debate and possibly give you language that would be useful if you sought to revise the law.

Last, we have a potential problem, but it is not an immediate problem. Let me describe it to you because it affects all of our work.

We are, obviously, an independent body. Our budget does not go through the President, but our questionnaires do. Under the Federal Reports Act, it is necessary for us to have clearance of all the questions which we ask in a written form, in the form of questionnaires, when we send them to more than nine parties within the United States.

It is impossible to conduct a 45-day case when it takes at least 60 to 90 days to get clearance from OMB of a questionnaire. We have worked out with OMB an arrangement, which is satisfactory to us at this time, where they give us a generic clearance, and then they give us what is called an information budget, meaning the total amount of burden which we can charge against the American public to answer our questionnaires.

So they do not see our questionnaires under countervailing duties and dumpings, but none of that is in the law. A future director of OMB might come in and say, "Sorry, we don't want you to burden the American public any more. We are going to remove this arrangement that we have given you," and, practically speaking, putting us for a period of time out of business.

I have been in that condition before, and I frankly ignored the law and sent questionnaires anyway. So far I am not yet in prison. But this same problem affects the conduct of all of our cases.

When you send us a section 332 investigation, we do not have such an arrangement with OMB, and OMB does, as the normal course of their work, require notification that we have requested a questionnaire, to answer a question that you have raised, in the Federal Register, giving the opportunity for the public to come forward and debate whether or not we should be asking the question in the first place.

OMB reserves the right to approve or disapprove of our questionnaire and, in the course of doing so can, by sheer time, be forced to ask questions in a fashion that OMB requests. This does not pertain currently to the administration of the countervailing duty and antidumping, but it does relate direction to section 332, and I think the committee might well consider removing that authority from OMB.

I have now summarized briefly my statement and observations. I will make a few quick statistical additions which I think will convince the committee, as it has me, that the basic act is working.

The first question I would imagine you would want to know is, is it possible for the Commission to find in the negative, not necessarily is it possible for the Commission to find in the affirmative, because that is the easiest thing in the world to do?

The record of the Commission from January 1, 1980, to April 11, 1983, in preliminary investigations on antidumping, the Commission found 97 in the affirmative, 35 in the negative. Eight were others, and I could discuss these others, but I think it is a distraction.

Thus, the Commission has been able to do what the Congress intended, which is to use the preliminary phase to eliminate cases which a majority of the 6—you will remember that under the law where it is split 3 to 3, it means that it is an affirmative finding—where majority of the 6 determined that there was not even a reasonable indication that an industry in the United States was materially injured by the alleged unfair act: 97 to 35 in preliminary investigation on antidumping, and 69 to 52 affirmative findings in countervailing duty. In both cases, therefore, the Commission has done what I think the Congress intended it to do, which is to cut out the cost of these protracted and expensive proceedings which could have gone on with very weak cases.

The next major question that I would have asked, let's say you carry on the cases after this exhaustive work you have just described in the preliminary phase, is it possible for the Commission to reverse itself and find affirmatively in the preliminary phase and find negatively in the final phase, because the standard of proof is higher?

The record, I think, will answer that. In dealing with antidumping cases, the Commission had 97 affirmative findings, of these 12 went affirmative and 3 negative. Eighty-two had something else happen to them and, of course, the great bulk of these were the steel cases that were withdrawn at the last moment. Thus, we have an illustration of 15 cases on which there was a final vote, and the Commission found in the affirmative 4 to 1. But it was able to change the vote, and did change the vote.

In countervailing duty cases, where there were 69 affirmative cases, in the final cases 14 went affirmative and 6 went negative, 14 to 6. Again, the Commission was able to use the time given in the final case to perfect the case to a point that, given a higher standard, it did find in the negative.

These are the ways in which the Commission has contributed to, I think, the intent of Congress, the reduction of cost and the efficiency of operation.

The total number of cases that we have conducted under the new act was reviewed in the chairman's statement. They are totally unprecedented in the Commission's history. The Commission has conducted a total of 251 countervailing duty cases, including 137 preliminary investigations, 159 dumping cases. To do this work, the Commission in 1982 spent approximately 84 man-years of effort.

Thus far, we have been a successful screening mechanism. We have not been reversed by the courts due to error, whimsicalness or arbitrariness although we have been thoroughly examined in 31 cases. We feel that we have saved everyone money in spite of a flood of cases which have caused us to lose substantial portion of vacations and Christmas. For over 2 years, we have coped.

Thank you.

[The prepared statement follows:]

STATEMENT OF CHARLES W. ERVIN, DIRECTOR OF OPERATIONS, INTERNATIONAL TRADE COMMISSION

Good morning Mr. Chairman and members of the Subcommittee. I was invited to speak briefly on a panel with Mr. Horlick on the Commission's administration of Title VII of the Trade Agreements Act of 1979, referred to as countervailing duty and antidumping cases.

I would like to endorse completely the statement of the Chairman of the U.S. International Trade Commission presented to the Committee March 16, 1983. All the senior staff participated in and assisted the Chairman in developing the positions in his statement.

INTRODUCTION

The U.S. International Trade Commission (Commission) conducts injury investigations under three different statutory provisions. These include all cases where dumping is alleged to be occurring. See Section 731 et seq. of the Tariff Act of 1930, (Tariff Act), as added by Trade Agreements Act of 1979, § 101, codified at 19 U.S.C. § 1673 et seq. (Supp. III 1979). The Commission conducts countervailing duty investigations for products from countries which are parties to the Subsidies Code or have undertaking substantially similar obligations. See Section 701 et seq. of the Tariff Act, 19 U.S.C. § 1671 et seq. (Supp. III 1979). It also conducts injury investigations for products from other countries if the product in question enters the United States free of duty. See Section 303 of the Tariff Act, as amended, 19 U.S.C. § 1303 (1976 & Supp. III 1979). The Commission's investigatory procedures and the timeframes in which the investigations must be carried out are identical under all three of these provisions. Regulations applicable to the Commission are found in 19 C.F.R. Parts 201 and 207 (74 Fed. Reg. 6189 (1982)).

STATUTORY DEADLINES

Initiation of investigations at the Department of Commerce

The Commission does not have the authority to self-initiate an antidumping or a countervailing duty investigation. We only investigate pursuant to a petition filed with us and with the Department of Commerce (Commerce) or when we are notified by Commerce that it has self-initiated an investigation.

Both antidumping and countervailing duty investigations can be initiated by the Department of Commerce of by filing a petition both with Commerce and with the Commission. 19 U.S.C. §§ 1671a(a) & (b), 1673a (a) & (b). Within 20 days, Commerce determines whether the petition alleges the elements necessary for relief (material injury to a domestic industry by reason of subsidized or dumped imports) and includes information reasonably available to the petitioner suporting the allegations. If the determination is affirmative, Commerce begins an investigation to determine whether subsidization or LTFV selling exists. If Commerce's determination is negative, the proceedings end. 19 U.S.C. §§ 1671a(c), 1673a(c).

Injury determination by the Commission

Within 45 days after a petition is filed or an investigation is initiated by Commerce, the Commission determines whether there is a reasonable indication that material injury to a domestic industry exists by reason of the allegedly dumped or subsidized imports. 19 U.S.C. §§ 1671b(a), 1673b(a); 19 C.F.R. §§ 207.12, 207.17 (1981). See 19 C.F.R. § 207.26 (1981) (factors considered in determination of material injury).

Effect of preliminary determination by Commerce or Commission

If the Commission's determination is negative, the proceedings end. 19 C.F.R. § 207.18 (1981). If the Commission's determination is affirmative in a countervailing duty investigation, within 85 days of institution of the case, Commerce makes a preliminary determination, based on the best evidence available at the time, of whether there is a reasonable basis to believe or suspect that a subsidy exists. 19 U.S.C. § 1671b(b). In extraordinarily complicated cases, this determination is made within 150 days. 19 U.S.C. § 1671b(c). In antidumping cases, Commerce has 160 days in which to make a preliminary determination on dumping margins, and 210 days in extraordinarily complicated cases. 19 U.S.C. § 1673b(b) and (c).

If Commerce's preliminary determination is affirmative, Commerce (i) requires bonds or cash deposits to be posted for the imports in an amount equal to the estimated net subsidy or the margin of dumping, and (ii) continues its investigation. See 19 U.S.C. §§ 1671b(d), 1673b(d). The Commission initiates an investigation to determine whether injury exists. See 19 U.S.C. §§ 1671b(d)(3), 1673b(d)(3); 19 C.F.R.

§ 207.25 (1981). If Commerce's preliminary determination is negative, the investigation simply continues at Commerce, but the Commission does not initiate an investigation. See 19 C.F.R. § 207.25(c) (1981).

Final determinations by Commerce and the Commission

Within 75 days (135 days in more complicated dumping cases) after its preliminary determination, Commerce makes a final determination of whether a subsidy or dumping exists. 19 U.S.C. §§ 1671d(a)(1), 1673d(a)(1) & (2). If this determination is negative, the proceedings end. 19 U.S.C. §§ 1671d(c)(2), 1673d(c)(2).

If Commerce's final determination is affirmative (following an affirmative preliminary determination), the Commission makes a final determination of whether a domestic industry is being materially injured before the later of (i) the 120th day after Commerce makes its affirmative preliminary determination, or (ii) the 45th day after Commerce makes its affirmative final determination. 19 U.S.C. §§ 1671d(b)(2), 1673d(b)(2); 19 C.F.R. § 207.25(b) (1981). In a case where Commerce's preliminary determination is negative, the Commission's final determination on material injury is made within 75 days after Commerce's affirmative final determination on subsidy or dumping. 19 U.S.C. §§ 1671d(b)(3), 1673d(b)(3); 19 C.F.R. § 207.25(c) (1981).

Final order by Commerce

If the final determination of the Commission is affirmative, a countervailing duty or an antidumping duty order requiring imposition of duties is issued by Commerce within 7 days of notification of the Commission's determination. 19 U.S.C. §§ 1671e, 1673e.

COMMISSION PROCEDURES

Within these exacting statutory deadlines, the Commission's investigative procedures for conducting investigations are based on our need to understand the industry in question, gather and evaluate all relevant information, and make our determination.

In general, preliminary and final investigations are divided into three phases: (1) institution, (2) data collection, and (3) Commission action.

Institution phase

For preliminary investigations, the institution phase involves the first seven days of the investigation. During this time, the petition is reviewed for compliance with the applicable statutes and regulations. The Department of Commerce will ultimately decide whether the petition meets the requirements for institution. The Commission must prepare a notice of investigation for the Federal Register, plan a work schedule taking into account statutory deadlines and other work, and assign staff to the investigation.

Data collection

The second phase, lasting from the third to the thirty-fifth day of the investigation, consists of data collection, tabulation, and analysis. The first step, and this usually begins the moment a petition is received, is the preparation of questionnaires necessary to gather the information not available from public sources. The questionnaires must be tested, which requres the assistance of industry representatives, and then mailed. At the same time, any necessary field work takes place, including plant visits.

Once the questionnaires have been returned, the information must be tabulated into usable form, and must be analyzed. In the interest of throughness, the Commission staff also conducts a public conference, at which representatives of the domestic industry and the importers, and any other interested persons, may present views on the investigation. The conference typically focuses the staff's attention on those issues which the parties themselves consider to be the key quesions in the investigation. They also serve to permit opposing parties to suggest analytical points and to refute arguments. See 19 C.F.R. & 204.15 (1981). The information obtained from questionnaires, briefs, the conference, and other sources is incorporated into a staff report to the Commission containing descriptions of the merchandise, the industry, the imports, and the trends in major economic indicators of the industry—including profits, employment, prices, and market shares. See 19 C.F.R. § 207.21 (1981).

Commission action

Overview of Process

The third phase of the preliminary investigation, usually using the final 10 days, is for Commission action. During this period, the Commission holds a public meeting at which it is briefed by the staff and then votes. Oftentimes, before the day of the vote, individual Commissioners request to meet with staff members for individual briefings. Also during this period, the Commissioners can review the record of the entire investigation before the vote.

After the vote, the Commission must draft its opinions and prepare a public (nonconfidential) version of the staff report. See 19 C.F.R. §§ 207.25–.27 (1981). The Commission's views must be transmitted to the Secretary of Commerce and published in the Federal Register. 19 C.F.R. § 207.28 (1981).

Commission Practice

The Commission has 120 days from the date of an affirmative preliminary determination by Commerce to conduct final investigations, 19 U.S.C. §§ 1671d(b)(2)(A), 1673d(b)(2)(A); 19 C.F.R. § 207.25(b)(1)(1981), and most of that time is dedicated to data collection and analysis. The data gathering is more thorough than in preliminary investigations, and the time permits greater depth of analysis. For example, Commission accountants can review the financial data provided in questionnaires. The most significant difference between preliminary and final investigations is the holding of a public hearing, see 19 C.F.R. § 201.11–.2, 207.23 (1981), preceded by a prehearing conference. This permits interested persons—including, occasionally, members of Congress—to present their views, to suggest critical analytical points, and to refute the arguments made by others. In short, the hearing, presided over by the Commission itself, focuses the investigation on the key aspects of the investigation.

Generally, the Commission has no trouble obtaining information from domestic industries. Considering that it is in their interest to supply us with as much information as possible, this is not surprising. Occasionally, there is reluctance on the part of producers, importers and purchasers of the products under investigation to provide us with information. This reluctance is usually dispelled when the Commission reminds these persons that information must be provided by law, and that its confidentiality will be protected to the fullest extent of the law. Thus, the Commission has rarely used its subpoena power to gather information. See generally 19 C.F.R. § 207.8 (1981).

An impediment to gathering information is the timeframe under which an investigation is conducted, especially a preliminary investigation. If the Commission knows nothing about a particular industry and if representatives of that industry have not contacted the Commission's staff prior to filing a petition, the Commission is faced with the very difficult task of learning about an industry and then tailoring its questionnaires to the particular industry in a very short period of time. Happily, we have been able to gather the information we need in all investigations, but the burden placed on Commission staff members under these circumstances is considerable.

A SUMMARY OF RESULTS

Since the effective date of the Trade Act of 1979, the Commission has conducted a total of 251 countervailing duty cases, including 137 preliminary investigations and 159 dumping cases, including 115 preliminary investigation. To do this work, the Commission in fiscal year 1982 spent approximately 84 man years of effort. The Commission has found in the negative in approximately 50 percent of the preliminary countervailing duty cases and in 37 percent of the dumping cases. Thus, the Commission has met the objective of the law to provide a screening mechanism to eliminate investigations which have not met the reasonable indication of material injury test. The effect of these preliminary negative determinations is to reduce the cost of protracted actions before the Commission and the Department of Commerce and the disrupting effects of these actions. This saves everone money. Despite a flood of cases utterly unprecedented in the Commission's history, we have coped.

Chairman GIBBONS. Thank you.

In substance, you don't believe that there is any way that we can shorten the term. Obviously that steel case, it is a wonder that you got anything done with all the roadblocks that occurred, everything from Air Florida to snow to Martin Luther King all in 3 days.

You had 3 million pages, did you say?

Mr. ERVIN. Yes, sir, two trucks. They were three-quarter ton trucks that were unloaded in the back of our alley at 4:30 in the afternoon of the first day, which meant that we had already lost 7½ hours when they unloaded. It took until 5:30 of the first day to unload, and we were not able to even distribute those boxes until 9:30 the next morning.

If you are interested in how much 3 million pages is, it was approximately in boxes 4 feet high and 67 feet feet long.

Chairman GIBBONS. Sixty-seven feet long?

Mr. ERVIN. Essentially from where I sit to the wall, and 4 feet high. I happen to recall that very vividly because I was wearing a very heavy coat, a large leather coat. The temperature in the basement at that time of year, because the door was open, was very cold. It was around 15 to 20 degrees. I can tell you that when I looked at that pile of paper I was shaking, not because I wasn't warm, but because I knew we had to get into those boxes and read like mad. We did it.

Chairman GIBBONS. How many people does it take to read 3 million pages in 3 days and propose a questionnaire?

Mr. ERVIN. We first had to find out how the boxes were organized. Obviously, we had to get them in an order. We concluded first, and most mercifully, that they were organized in 18 piles which then had to be rebroken by country.

Then we sat up 2 nights and read the allegations that were made by the three separate law firms who represented different collections of steel companies each in a slightly different fashion. When we read it the first time, we thought that we had done it perfectly, and then a very, very good reader discovered that we had missed a product, because we had missed one whole section of an appeal that we mercifully got to before we sent out the questionnaire. We have never been corrected, so we apparently got them all.

Chairman GIBBONS. Do you think they know what they filed?

The thrust of your testimony is that you can't save any more time.

Mr. ERVIN. I cannot.

Chairman GIBBONS. How can we cut costs for the petition?

Mr. ERVIN. The most important single cost is court review, and the necessity to develop for court review a complete record which will allow a judge, who might have a year-and-a-half to review what you did in a half-hour, the opportunity to examine it and come to a conclusion. If the committee were to remove court review, this would greatly simplify the procedure.

Chairman GIBBONS. You are talking about the interlocutory court decrees?

Mr. ERVIN. On the final case. It doesn't have to be interlocutory, it could be a final court review. We did not have court review prior to 1979.

However, if you did this, as Gary Horlick pointed out earlier, you would run the risk that in the course of doing it there might be more direct political control over the results, because there wouldn't be a court involved.

I think, on balance, as difficult as it is to come to this conclusion, I believe the Commission speaks with unanimity that court review is essential to insure the fairness an equity of the entire system, both as we administer it as well as the way in which the Commerce Department must administer it. Obviously, if you want to save cost, that is the way to save cost if that is a priority, with a risk to equity.

Chairman Gibbons. Would you distinguish in that answer between the interlocutory proceedings, and when you have reached the final decision?

Mr. Ervin. Yes. Obviously, the final decision is the one where the court review is the most useful. The interlocutory decision is the one that is the most disruptive.

Chairman Gibbons. As far as the judicious handling of the case, would you feel like you were losing anything if we decided to do away with the interlocutory court proceedings?

Mr. Ervin. I would not. However, this is a very dangerous position for me to take because the courts might take action based upon my observation which I have made as an individual. I am reluctant to go further than that. We have many cases before the courts now.

Chairman Gibbons. I know that, and I don't want to get into any specific case. What I am looking for is how procedurally we can save time and save money.

The previous witness, Mr. Horlick, mentioned that the interlocutory court actions while the proceeding was going on was in his opinion disruptive.

My question to you is, as a professional, do you think that we would lose anything in the effective handling of these cases if we limited court action to just the final determinations of the Commission?

Mr. Ervin. I believe that you would gain something and not lose anything.

You would gain the capacity of focusing attention on the gathering of the case rather than the legal argument that is involved in the interlocutory finding, and the distraction of the one or two people within the Commission and/or the Department of Commerce who have the answers to the issues that are issue.

Chairman Gibbons. Without going into any of the cases, can you give me an illustration about what kind of form these interlocutory interventions take?

Mr. Ervin. Essentially, so far we have not had that problem in the Commission. The Commerce Department has.

Chairman Gibbons. The Commerce Department has, but not the Commission.

Mr. Ervin. We have it as a potential threat, but we haven't had any interlocutory actions. We have only actions that deal with our final decisions. In preliminary cases, only where the Commission votes in the negative, and in final cases where it votes however it votes.

Chairman Gibbons. What are all these things that you have given me on those yellow sheets, I have not had a chance to analyze it.

Mr. Ervin. This is more for general information. It constitutes the current work approved by the Commission that is currently underway. For those who are not familiar with the Commission's work, I have also included the annual report for 1981.

So if you wish to read this, just for general information, you can see the workload and the scheduling approved by the Commission for its current activities. The scheduling is shown in two different fashions. There is a summary of the investigations in white, and yellow represents the calendar.

Chairman Gibbons. So today you have a hearing on certain rubber footwear from Brazil, India, and Spain; is that right?

Mr. Ervin. Yes, that is correct.

Chairman Gibbons. How long do these hearings normally take?

Mr. Ervin. It depends very much on the commissioners and the way in which they operate. It is, after all, a collegiate body much like this committee, and there are no statutory deadlines. Some groups of commissioners in some cases will complete a hearing within a part of a day, others a full day and night. In some of our major investigations, they will go on for several days.

The longest hearings we ever had were on automobiles, which went a marathon of 6 or 7 days and nights until 10 to 11 o'clock at night. Obviously, the subject was of extraordinary importance to the United States. It varies very much depending on all the surrounding circumstances.

Chairman Gibbons. I am sure you have heard from me before, and you have heard in these hearings here today that my objective for the committee is to try to limit and focus our discussion for legislative action this year to the so-called unfair practices, trying to find a way to make the procedures more expeditious and trying to find a way to make them less expensive. Do you have any recommendations as to what we could do?

Mr. Ervin. I think it sounds dreadful to say no, but our senior staff, in dealing with this for several years, have quietly sat down—without being in the presence of the Commission, or without necessarily any reference to the outside world—and quietly asked that same question ourselves, not once but repeatedly over a series of meetings that we had over two or three months. We came out with no magical way of increasing the time or reducing the cost.

I think we all agree with Mr. Horlick that there is a tendency that is built into our society to excessively litigate. We can do many of these cases with far less involvement by counsel. Counsel is very expensive.

Having said that, that is not necessarily the view of private individuals or corporations that seek relief from the Government. They seem to feel the need for having well-experienced, very costly, highly skilled counsel.

Mr. Horlick has observed that sometimes this counsel helps, and it does in our cases as well. But there are an awful lot of times where its total contribution is worth far less than its cost. It leads to far more information, far more argument, far more data for the specific client than we want or can use. We end up on the staff having the information which is what the Commission uses for its decision.

Having said that, the bar is skilled. It understands us. Best of all, it understands how to explain this to their clients. One of the most effective things they can do is to limit the discussion from passionate private parties to the issues of the statute, and help focus the nature of our debate.

They have a function. They have a role. I wish I could cost-contain counsel, but I have no idea how you do that. I really don't believe that we have many effective ideas that we can offer to accomplish in some method what you have laid out as your objective.

Chairman GIBBONS. Have you looked at the way other countries make these kinds of decisions?

Mr. ERVIN. I have only had contact with the European Economic Community where I am generally aware of the procedures which they use, but I don't maintain that I or anyone in our Commission is highly knowledgeable about even the European Economic Community. They do not use a procedure which is as open as ours, where the parties have access to all of the information, where the debate provides true transparency.

We have set as our goal, in our international negotiations, what effectively we have achieved in our own country. I think it is the aspiration of those who administer those laws within the European Economic Community to more resemble us, but they haven't really succeeded in doing it.

I have received nothing but compliments, perhaps for self-interest but I believe them to be genuine, for the administration of our trade laws in the United States by those who are not necessarily pressing interests, but having to cope with the internal problems within their countries, primarily because Congress has made it a legal procedure and not a political procedure.

Where the Congress wants a trade issue to be a political issue, it can do so. It obviously has laws, or takes actions which are exempt, in effect. The rest of the world seems to do that far more commonly, and our objective should be, I believe, to move as far as we can in the opposite direction.

Chairman GIBBONS. When do you think you will have an answer for us on the targeting?

Mr. ERVIN. Our current plan is approximately as follows: We hope to have a report to you on Japan in approximately 5 months. We have not studied targeting before, so we are only beginning this project. We will have a second phase covering the European Economic Community approximately 5 months after that.

Then a third phase in which we hope to cover the other major countries that we believe to be targeting, which would include Brazil, Korea, Taiwan, and possibly Singapore, 5 months following that. We may be able to accelerate slightly, but we start really with very, very limited knowledge of the subject.

At this point, the Commission has not approved that tentative plan, in fact, it has not seen the outline of our work product. Obviously, in this negotiation there could be revisions as we start on our venture.

Chairman GIBBONS. Mr. Schulze.

Mr. SCHULZE. Thank you, Mr. Chairman.

Thank you, Mr. Ervin. I think the ITC does an admirable job with somewhat limited resources.

In your opinion, if your decisions were enforceable as a matter of law, rather than recommendations, would they be the same?

Mr. ERVIN. Mr. Schulze, the decisions that are made under countervailing duty and dumping are enforceable under law. The decision that we make is whether or not there is injury by reason of it. The Commerce Department must enforce the law with the margins which they find. We make recommendations under sections 337, 201 and 406.

I think that my answer to your question regarding section 337 is that, since the issues in 337 involve largely civil matters between two parties, there is no very great value in the President reviewing them. What it tends to lead to is dabbling by ambitious attorneys who find some legal point they would like to pursue to argue with the collegiate body of the Commission, who in turn get the President's franchise on a document reversing the Commission. This is not terribly useful or helpful.

In regard to section 201, the issues are of a nature in which the issues that are reviewed by the President are very serious matters. They deal with the foreign policy of the United States. I am reluctant to assume that the Commission could take on that responsibility and, obviously, not have the information that is known to the President.

I give as one illustration that sticks in my mind the possible hypothetical finding against Canada at the very moment that Jimmy Carter might have been the only person in the administration to know that the Canadian Government was harboring U.S. diplomats in Iran, and was unwilling to impose a burden on an industry at that moment over that delicate negotiation. That, of course, is a preposterous burden for American industry to bear, but it is in the nature of foreign relations that someone must bear that. I doubt that the Commission could.

Under section 406, under which we give advice, it is probably but not certain that the Commission's decision could be final. Under 201 I think that it cannot necessarily be final.

Had I testified on the panel on 201, which the Chairman, as I understand, is postponing that question, I did have a few minor suggestions over work that the Commission could do that might reduce the internal disputatiousness among the various Government bureaus on the conduct of 201 cases.

It is my belief that the President's failure to accept a reasonable percentage of the Commission's recommendations on 201 has simply diverted the pressures that were supposed to go under law under 201 into other channels.

Mr. SCHULZE. I was thinking along the lines of the 201, and whether you would have any thoughts on locking in the President's ability to make recommendations to a certain percentage or a certain portion of your recommendations, so that even though there were some foreign-policy ramifications, to a certain degree your recommendations would be enforced. Do you think that 201 has to be entirely discretionary?

Mr. ERVIN. I think so, sir. I realize the argument in favor of a percentage, what is reasonable, but you begin to be manipulative for that purpose, actions are filed, and you begin to play a statistical game.

I think it extraordinarily dangerous to use the escape-clause mechanism strictly in the end as solely a legal action which is what we would be suggesting. There are likely to be so many international implications from actions that not one must be responsible for this.

Congress and the Commission can agitate, rebel, and view with alarm failure of the President to pay any attention to this mechanism. I think Presidents are foolish not to pay any attention to this mechanism because the pressures will come at them anyway, only they will come in less viable forms.

The advantage of the Commission is that it is a place where six people are listening to this for months, subject to court review where there is an opportunity for all of the frenzy to be played out in an orderly, systematic, and equitable environment. When the President will not accept a reasonable percentage of these cases, they come to him from his campaign contributors or through other pressures.

Maybe the future will teach Presidents that they should take a reasonable percentage, even if they don't like some of the Commission's recommendations, even though they are not perfect, as a way of implementing the law that they themselves agree to under GATT, and as a way of conducting as a general statement our international trade policy, rather than a series of ad hoc committees that go by plane all over the world trying to work out deals on this subject or that subject, which seems to be the alternative.

Mr. SCHULZE. So, in your opinion, if 201 decisions were enforceable as they were rendered, there would be no change in the pattern that we have seen in the past? That extra burden would not influence the Commission?

Mr. ERVIN. No. I say that casually, but it depends obviously on the volume of cases. But we can cope with what we have had. We have shown that we can. I, therefore, think that we can cope with what we can reasonably expect.

Mr. SCHULZE. In your opinion, the Commission doesn't say, "This is just a recommendation, so that we don't have to be too exact on it," they do feel that they have researched it thoroughly and that this is the best solution?

Mr. ERVIN. In terms of that which they are asked to do. What the Commission does not do is the section 202(c)(3) law which means the Commission does not consider the foreign-policy implications, and it doesn't really consider the impact on the consumer. Broadly speaking, it doesn't consider the job cost.

The press is full of how much job costs there are for any recommendations that the Commission comes up to. I have sat with the Trade Policy Staff Committee, and I have heard economists come up with numbers related to job costs. The difference between the high and low is a factor of four or five times. We do not have a science which allows people of similar training to come up with a number that actually says what the job cost is.

I would argue that one way to reduce the disputations of all of these individual factions that are trying to use this number is to use one number, and assign the task of developing that to the Commission, because we are not trying to sell anything.

I am not sure that this would turn off all of these economists that are coming up with numbers to prove their point. But it is something that we do not consider for our opinion. The Commissioners do not look at the cost of jobs for a given remedy. Under the statute, that is not currently their assignment, but the President is supposed to do that.

Mr. SCHULZE. Thank you, Mr. Ervin.

Thank you, Mr. Chairman.

Chairman GIBBONS. Mr. Pease.

Mr. PEASE. I have no questions.

Chairman GIBBONS. I want to thank you for your help. I hope that you will proceed as rapidly as you can on the targeting studies that we have asked you to make, and that you will consult with us as you go along. I hope you will continue to try to find ways in which we can reach the goal of moving faster.

Let me ask you, since you have not looked at targeting before, would it be helpful if we provided or requested you to look at specific targeting operations in specific countries?

In other words, suppose the Ways and Means Committee or the Finance Committee, through one of our inquiry procedures, asked you to start on these and look at them, and see how much time could be saved?

Eventually, some of these targeting operations are going to end up before your Commission. As I look back at Japan, they have told us that they are going to target this and they are going to target that. We have sort of said, we will wait 10 or 15 years and see what happens. Then 10 or 15 years later, we end up with a whole group of cases and a lot of political protestation that we should have seen coming, but we just didn't do anything about it.

Have you thought about that at all, what we could do to perhaps speed up the decisionmaking, the information collecting?

Mr. ERVIN. No, sir, we are at such a preliminary phase that I am just trying to get an exercise underway. It is, of course, quite possible that, on the basis of your trip alone, you have put together a list of very specific issues you would like to have researched, which could be more focused to us than our generating from the general literature, secondary literature primarily, such a list.

Chairman GIBBONS. Yes.

Mr. ERVIN. That could be easier for us to respond to rather than the general topic which is not really highly structured at this moment, but is just becoming structured. Clearly, one of the things, for example, that is structured is the 64-K chip question, which has a lot of secondary literature, many people have commented on it.

Chairman GIBBONS. Yes.

Mr. ERVIN. There may be others.

Chairman GIBBONS. As I look at targeting in Japan, they go through a very elaborate process of deciding what they are going to target, at least they apparently are doing that now. I don't know how long they have been doing it.

A part of it, of course, is the history of Japan, and its forced recovery after World War II. It had to allocate resources. It had to try to do all those things in order to survive. It seems to me that they have sort of edged from that practice over to their current industrial policy, which is probably a normal transition that you would make.

Targeting, as I understand it, is being developed in Japan now, is an elaborate public discussion between the industry and Government, including the academic community, about what are the areas of future development of industry within Japan. The Government will submit eventually a recommendation to the Diet in the form of legislation. The Diet usually passes it without a lot of amendments. Then the whole public process goes on, of selecting the industries involved, the contractors involved, so to speak, and the whole process goes on for quite some time, and there is a general public discussion of it. We obviously have known about it, but we obviously have not paid much attention to it.

I guess it is like some forms of cancer, there is a long time between, for instance, an excessive exposure to the sun and skin cancer in the average human being, and most people don't relate it until it is too late to do anything about it.

That is about the same way we have looked at some of the Japanese processes. It takes a long time to target an industry or target a product, or a group of products, and by the time we get around to recognizing the danger, it is almost too late to do anything about it.

My question is, based upon your experience, Would it help, would it shorten time, would it perhaps save money if we directed to go into these things when we first begin to learn about them?

Mr. Ervin. I don't really know enough about what we, ourselves in the Commission, can finally do to fully answer your question. We run the risk of dispersing our resources over a great number of different subjects——

Chairman Gibbons. I realize that.

Mr. Ervin [continuing]. And having a somewhat limited outcome as a result.

I envision the possibility that targeting becomes a statute, it becomes as full of meaning in the words of the statute as we have the meaning and the words in our countervailing duty and antidumping statute, which evolved over a period of time, a body of law and practice, which can be applied to deal with the problem. We are at the first days of this.

I could be very wrong and targeting could end up to be just the 1983 buzz word. I am not content with that because state intervention is occurring in Japan not only in export industries, but also in depression cartels, as they are called.

Chairman Gibbons. Yes, that is correct.

Mr. Ervin. They can be arguably as unfair in the sense that they exclude more efficient and cost effective producers from entering their market, as are the so-called export incentives. It is a big topic. I hate to try to promise a particular tactic when I am really not certain of my own position.

Chairman Gibbons. Fine, that is a fair answer.

That is all the questions we have right now. We may have more for you in writing.

Our next witness is from the American Mushroom Institute. Would you please come forward, Mr. DiCecco and Mr. Kooker.

Mr. Schulze. Mr. Chairman, if I may. It may go without saying that I would like to welcome Mr. DiCecco, who is a constituent of mine, as you might have guessed from his topic. He is a very outstanding member of the business community in the southern part of Chester County. I want to give him a warm welcome to our committee today.

Chairman GIBBONS. Fine.

STATEMENT OF THOMAS DiCECCO, JR., PRESIDENT, THE OXFORD CORP., ON BEHALF OF THE AMERICAN MUSHROOM INSTITUTE

Mr. DICECCO. Mr. Chairman and members of the committee, my name is Thomas DiCecco, Jr. I am president and general manager of the Oxford Corp., Oxford, Pa., a small mushroom-canning firm. I am here today representing the American Mushroom Institute, a national mushroom industry trade organization based in Kennett Square, Pa.

The AMI consists principally of mushroom farmers, although membership also includes supplier associate members and the few remaining mushroom canners that have yet survived the adverse impact of imports, principally from Communist China, Hong Kong, Macao, Taiwan, and Korea.

Since 1964, the U.S. mushroom industry has been investigated by the International Trade Commission 10 times. As a result of most investigations, the ITC recommended the imposition of quantitative restrictions upon exporting countries.

Quantitative restrictions were never imposed, although other methods of remedy were attempted. The consultations held with exporting countries were futile. Voluntary restraints were ignored.

The increased tariff was offset by the nearly concurrent admission of Communist China as a trading partner who simply adjusted their base prices to compensate buyers for the higher tariff. No intended plan of remedy has worked for our industry. The increase in the tariff rate has, however, enriched the general fund by over $31 million and not a nickel of it has come to aid the mushroom industry.

Another remedy provided by the Trade Act is adjustment assistance. A Presidential order provided expedited adjustment assistance for the mushroom industry. My firm has been tediously working on such an application for nearly 4 years.

Although our loan application was approved last week, we are doubtful that funding will ever occur because of the many contingencies added to the approval which were not included in the prior data submitted by my company as requested by the Department of Commerce. Many other firms have requested assistance and have been certified as injured, although they were unable to deal with the unsurmountable bureaucracy posed by Commerce.

What can be done to provide meaningful assistance or remedy? A formula for automatic trigger action should be instituted.

From 1971 to 1981, U.S. mushroom consumption increased 250 percent. During that same period, imports increased 344 percent. During the last 3 years alone, mushrooms from Communist China alone increased from 265,000 to 27.4 million canned pounds.

An import impacted industry such as this should not have had to appear before the ITC 10 times asking for some preservation of its marketplace and receiving nothing. If a situation must be considered by the ITC, it should be accomplished promptly. The existing 6 to 12 months used for an investigation is too long, particularly with continued market disruption during the investigation.

Beyond the ITC there appears to exist an extreme lack of desire to enforce the congressional intent of the Trade Act with respect to remedy. The discretionary aspect should be removed. ITC recommendations should receive affirmative action. Impacted industries must be compensated. If unfair trade, as the mushroom industry has experienced, is mandated for the need of some strategic alliance, consideration must be given to those directly affected.

Finally, competent individuals and agencies must be charged with expeditious administration of sound remedy.

This ends my statement, Mr. Chairman. Thank you.

Chairman GIBBONS. Thank you.

First of all, I want to commend you for having sat here all morning. I have watched you there as we have gone through these hearings. I realize that you probably never thought that we would finally get to you.

As you can see just from your exposure here today, there are some serious problems out there for us to wrestle with, and we are trying to wrestle with them. I am sorry that you have had such poor results from your attempts to compete, and from your attempts to get remedies from the Government.

I hardly know where to begin in asking you questions. I notice that there has been a dramatic increase in consumption of mushrooms. What has caused this dramatic increase in consumption of mushrooms?

Mr. DICECCO. The primary mission of the Mushroom Institute is to promote the consumption of fresh mushrooms. In past years, a substantial portion of its budget has been allocated to marketing, although as time goes on and less and less funds become available from the individual growers or their operations are less profitable, they are in an increasing manner unable to contribute.

As of today, the American Mushroom Institute has no budget for marketing because its membership has decreased substantially because the growers, first of all, have gone out of business and have ceased to exist, and the few left cannot afford to remove funds from necessary budgets of their operations to contribute to trade organizations. It is a very tough situation.

Chairman GIBBONS. Do you feel that these mushrooms are being dumped in here, and subsidized, or are they just coming in under fair but very competitive trade practices?

What is causing all this increase in foreign mushrooms?

Mr. DICECCO. Sir, the industry definitely feels that the principal mushroom supplier, Communist China, is dumping.

One firm in the industry, the 4-H Mushroom Co. from Michigan, has already instituted an antidumping action which the entire American mushroom industry, including the American Mushroom Institute, supports. We feel that dumping has occurred.

The ITC very promptly heard the portion of the case that comes before them. They have unanimously decided that dumping has occurred, and they have moved that over to the Department of Commerce. It is my latest understanding that the Department of Commerce is hung up in the law as it now exists in deciding on the surrogate country under the existing law. They are having difficulty making that selection, and they have not yet.

Chairman **Gibbons**. You have already heard the discussion on the surrogate country. I won't ask you to repeat that and the problem they have with that.

Mr. Schulze.

Mr. **Schulze**. Thank you, Mr. Chairman.

To follow on that line of questioning, Tom. In your opinion, don't you think that Communist China has used this as an opportunity to get hard currency, and as a device and method by which they can enhance their supply of hard currency, and that is the main reason that they are so heavily in the mushroom business?

Mr. **DiCecco**. I am not an economist, but I believe that I have been exposed to a situation directly that will uphold the thought behind your question, Mr. Schulze.

For example, Hong Kong does not grow any mushrooms on their own. They are strictly a canning entity of mushrooms from Communist China. Because the Hong Kong suppliers must pay Communist China for the fresh mushrooms they buy, mushrooms temporarily preserved in a salt brine, the letters of credit that Hong Kong has to offer to Communist China must be in U.S. currency. That fact upholds the exact theory behind your question.

Mr. **Schulze**. Tom, you have said that the AMI and the mushroom industry has been before the ITC 10 times. Would you just very briefly go over the last couple of times and your opinion of what happened?

Mr. **DiCecco**. Sure.

Let's move back to 1976, for example. Under section 332, an investigation was started. The President became aware of the vast increase in imported mushrooms that was occurring. As a result of that, he directed that the Special Trade Representative request that the ITC expedite an investigation.

The ITC did investigate and on January 10, 1977, recommended that a tariff rate quota be implemented. At that time, the American Mushroom Institute recommended that a quota adjustable relative to apparent consumption be implemented.

The President, on March 10, 1977, stated that import relief was not in the national interest and set up a program of monitoring based on assurances from Taiwan and Korea, at that time, that disruptive quantities would no longer be shipped.

Next on March 14, 1980, we filed for relief under section 201 of the Trade Act. On August 14, 1980, the ITC recommended that the President impose a quota of 50 million pounds for 5 years. In November 1980, the President caused the increase in the tariff rate. In the first year of the increase, it rose up 20 percent over the existing rate, and then decreased down in steps down to the preexisting rate as of November 1983, when it will have totally dissipated.

The marketplace changed substantially with the nearly concurrent admission of Communist China as a trading partner, who openly advertized that they would adjust their rates to cover for higher duties, it just totally negated the intended effect of the tariff. So the industry there again received no relief or remedy.

The next major step, just last year, on June 30, 1982, the AMI filed for relief under section 406. During September, the ITC recommended a 21 million pound quota on Communist China.

The AMI, or the American mushroom industry had requested an orderly marketing agreement. In fact, other exporting countries, the principal exporting countries such as Taiwan and Korea, had essentially endorsed our request for an orderly marketing agreement. There was no action taken by the President, nothing at all.

I mentioned about the antidumping. On November 18, we petitioned for relief under the antidumping. We are experiencing difficulties as reviewed by Mr. Horlick.

We are just now considering a petition for the extension of that tariff under section 203, and the industry is severely hard pressed to come up with the money to do it.

Mr. SCHULZE. It is a sad story.

Tom, if you could make one recommendation to this committee— It seems to me that you have followed the laws that are set up in an attempt to get relief, and that has been relatively to no avail. If you had a recommendation to make to this committee, with the understanding that what we are doing is trying to make these laws enforceable and fair, what would that recommendation be?

Mr. DICECCO. I would say, impose immediate quantitative restrictions to permit stabilization of the domestic industry. Put some teeth in the laws as they now exist to provide meaningful protection to U.S. industries. By that I mean create automatic trigger actions that would, one, remove the burden of proof from domestic industries.

The numbers mentioned earlier that even the very basic petition costs the small industry about $100,000, and that is not really relevant to the cost of the petition and all the considerations therein. It is just what the industry has to come up with to get things going with some legal credibility.

Such a trigger action would prevent the blatant disregard of the informal requests and negotiations that we attempted. Such a trigger action should take place when the imports exceed a given quantitative restriction and exceed a pro rata percentage of apparent consumption relative to individual country allocations.

You have heard me say many times, Mr. Schulze, that we are Americans paying taxes, employing Americans. I sincerely believe that we have a right to the markets that we create through our free enterprise system, without interference from countries with substantially different ideals and standards, particularly nonmarket economies.

Mr. SCHULZE. I thank you very much, Tom, for the testimony.

What makes this perhaps a little more heart rendering case is that, of course, after the war, the U.S. Government asked those of you in the mushroom growing and canning business to go overseas and help others with your expertise. In effect, we taught them how to grow and can, and do the things which we are now being impacted by.

Mr. DICECCO. That is true but with a little different twist.

Through the program called AID, the U.S. Government took our technology and brought it over there. The people from this industry did not go over there and teach them how to do it, essentially.

Mr. SCHULZE. I thank you.

Thank you, Mr. Chairman.

Chairman GIBBONS. Thank you, sir.

Next is a group of companies, American Spring Wire Corp.; Carlisle Tire & Rubber Co.; Florida Wire & Cable Co.; PPG Industries, Inc., Glass Division; Roses Inc.; SCM Corp., Consumer Products Division; and the Timken Co., all represented by Mr. Terence P. Stewart, their counsel.

Mr. Stewart, first let me say that I realize that you have also been here since before 9:30 this morning. I say to you that I am sorry it has taken so long to get to you. You proceed as you wish and lay out your case.

I want to thank you for making available to the committee copies of your statement. As I told you the other day, I have not read it all, but I have read a lot of it and I am going to finish reading it all because I find it very helpful in understanding these matters. But don't let me take any more of your time.

STATEMENT OF TERENCE P. STEWART, SPECIAL COUNSEL, AMERICAN SPRING WIRE CORP., CARLISLE TIRE & RUBBER CO., FLORIDA WIRE & CABLE CO., PPG INDUSTRIES, INC. [GLASS DIVISION], ROSES INC., SCM CORP. [CONSUMER PRODUCTS DIVISION], AND THE TIMKEN CO.

Mr. STEWART. Thank you, Mr. Chairman.

It was my pleasure to be here this morning. It is always a unique opportunity to have an opportunity to listen to both Mr. Horlick and Mr. Ervin, both respected members of the two agencies.

This morning my testimony may seen reminiscent of Robert Browning's "The Seven Rings," in that the testimony of different witnesses sounded like complete different stories but in fact they were all describing the same set of events.

Our firm in the last 25 years has had the opportunity to represent a great many domestic industries, many small and many large. In the last 3 years in particular, we have had an opportunity to be involved in a great many cases under the antidumping and countervailing duty laws.

We believe that there is significant room for improvement to make the relief that the Congress sought to make available to domestic industries in 1979 more readily available, available at less cost to domestic industries, in a manner that in some instances would take less time and would have greater certainty.

We have presented both a full statement and what is called an executive summary of our statement. I trust that both of those will be made part of the record.

Chairman GIBBONS. Yes. The entire statement and the summary will be made part of the record. I will call the clerk's attention to the correction sheet up in front, so that it is included in the proper place in the statements.

Mr. STEWART. I will very briefly, Mr. Chairman, go over six major topics that we have discussed in our prepared testimony. Four of them really pertain to the Commerce Department, and one of them pertains to the International Trade Commission. A second pertains to the International Trade Commission, but I will not review it as it basically pertains to section 201 of the law and possible amendments.

Chairman GIBBONS. All right.

Mr. STEWART. Turning first to the International Trade Administration of the Commerce Department. Domestic industries feel that one of the most important advancements in the law as adopted in 1979 was the introduction of what practitioners call the 751 review, the right to an annual review.

While the agency in many cases has done its best to provide an opportunity for domestic industries to participate and to conduct these reviews in a timely fashion, there are a wide range of problems in the administration of that particular provision that we have identified of some length in our statement. I will give you but just a few.

Foreign respondents have been permitted, under the statute and the agency's regulations and practice, to provide virtually no nonconfidential version of their questionnaire response.

The result is that the domestic industries are prohibited from participating in the analysis of the information supplied by the foreign respondents to see if it makes sense from the business realities that they are intimately familiar with.

That increases the cost to domestic industries seeking relief because they are dependent upon outside counsel's expertise, or lack thereof, in analyzing not only legal but factual questions. This is particularly true in the areas such as where there is not identical merchandise under the antidumping law, but rather similar merchandise, and the foreign respondents provide a list of what they claim to be their most similar items.

A second area of concern is the failure of foreign respondents in many cases to supply certain information in the questionnaire, but rather to supply that information during the verification process itself. The result again is the denial of an opportunity by domestic industries to actively participate.

A major area that is not addressed by the statute and is directly presently implemented by the agency is the verification process. From our firm's many years of experience at being involved in these cases, a critical stage in most antidumping investigations, and many countervailing duty investigation is verification.

As it is presently structured, the domestic industries have virtually no input. They have no right to participate, and do not get an early opportunity to review the results of the verification process. Again, in an important segment of the annual review or in the initial investigation, the domestic interested party is shut out to a significant degree.

There is a great deal of time and effort, as Mr. Horlick identified this morning, generated in attempting to obtain the confidential information. We support Mr. Horlick's position that that process should be made more automatic and should be permitted earlier on. We support it not only for the ITA but for the ITC.

There is a strange anomaly in the law, as the statute is written and interpreted by the ITC and upheld by the Court of International Trade, that domestic industries alone are to be discriminated against in access to confidential information at the ITC. We believe that this is an unfortunate oversight in the way the statute is constructed, and it puts the domestic industry at a significant disadvantage when it is appearing before the ITC.

The agency, the Commerce Department, in the 751 reviews, has asked or is seeking to have greater authority in averaging. In our experience under the new law, in the many cases that we have been involved in, we believe that that would be but one more way in which the margins of dumping that exist in a case can be eliminated.

One of our clients that we represent here today is in the middle of a 751 review, and he has been in other 751 reviews where much of the dumping that is complained of is selective dumping for particular accounts that are important accounts in a region, which have been targeted, if you will, for special pricing, special promotions, and other things, the effect of which disappears to a significant degree if averaging is done.

The statute as presently configured permits, in certain situations, averaging to occur in determining the foreign market value, a statutorily defined term, but does not permit, and we believe it would be error and it is error for the agency, to average the U.S. price, which is the price at which the merchandise is sold here in the United States through a related party, or the adjustments. Yet, that is exactly how the agency proceeds, and the effect is to diminish the margins that can be found where there is obvious price discrimination.

There are a number of other problems with the 751 review that are identified in our prepared statement.

I would like now to turn to an area that is of great concern to all of the clients that we represent here today, and that is the antidumping law.

Probably there is no other law in the trade field that in our opinion has been misinterpreted to a greater extent than our Nation's antidumping law. Particularly unfortunate is the myriad misinterpretations of how price discrimination adjustments can be made to eliminate dumping in the case of related parties.

Our firm has a great deal of respect for the people at the ITA and assumes that there must be a rational theory for why, without exception, the discretion of the agency has been interpreted in the area of related party transactions to rule in favor of the foreign party. Let me give you just a few examples.

We lay out in what I will call the blue brief, the full statement, a four or five page example of identical transactions. One that would be conducted under what in the trade is called the purchase price situation. The other which would be conducted under what is called an exporter's sales price.

There is at present in litigation the issue of the exporter's sales price offset, which is a deduction from foreign market value of the indirect reselling expenses incurred in the U.S. marketplace.

Chairman GIBBONS. Is that the material that starts on page 46?

Mr. STEWART. It begins, Mr. Chairman, I believe on page 57.

Chairman GIBBONS. I am sorry.

Mr. STEWART. In pages 57 through 61, we have a 25 line description of various calculations of items. If you combine that with the example that you have cited, Mr. Chairman, earlier on page 46 through 48, those two give you absurd results that we do not believe have any justification, but which have become the law as administered by this agency.

Indirect selling expense is not from the seller, i.e., the foreign producer, to the U.S. importer. That is not what is compared. They take reselling indirect expenses and say that those that occur in the United States have to be offset in the foreign country, in the European Community, Australia, Canada, or wherever, in order to be fair. The examples that we have presented show that it is not fair.

The two antidumping codes that have been entered into by nations, the one in 1967 and the antidumping code in 1979, provide specifically for a provision for profits to be deducted from what we call U.S. price, where there is a related party transaction.

The administering authority, despite the fact that it is internationally acceptable under the GATT, has refused to do so. The result is that you have an overstated U.S. price which has the effect of dramatically reducing dumping margins.

The agency has insisted upon taking deductions and claiming that deductions from foreign market value constitute adjustments for differences in circumstances of sale. There has been no analysis of whether there are differences and an adjustment made for a difference, nor has there been an analysis of the expenses incurred at the same level.

These are a variety of the actions that have been taken by the administering authority in the area of the antidumping duty law that have virtually eliminated the ability of domestic industries that have proof of dramatic price discrimination, it can be as much as 100 percent between the foreign market and the price at which the goods are sold in the United States, to come up with more than a de minimis amount of dumping margins.

We have proposed some modifications to the statute which appear to be necessary to permit the domestic industries, in the most sensitive area, related party transfers between foreign countries and the United States, to have a fair shake at having price discrimination attacked in an area that applies to both purchase price and exporter sales price.

What, in the context of a price discrimination statute is particularly bizarre, is the irrebuttal presumption that the agency has established that a foreign producer, who is able to show on an ex post facto basis that there is a difference in cost, is entitled to an adjustment for differences in circumstances of sale. Let me give you an example.

It is very often the case in these dumping proceedings that we have been involved in, that in a particular market a producer will sell, as U.S. producers sell, on a delivered cost basis, f.o.b. customer's warehouse or customer's store, and that the price that will be offered is the same, even though there are differences in transportation costs.

Similarly, one customer may pay in 30 days, while another customer may pay in 90 days. Most companies do not charge interest. They charge the same price even though on an imputed interest basis there is a difference in cost in selling to company A versus company B.

Even where there is evidence of that in the record, that the foreign producer does not vary his price by differences in cost, the agency insists on granting an adjustment and the adjustment has the effect of reducing the dumping margins that exist. So basically a domestic producer is caught in an accounting game.

No matter how large the price discrimination, there are vehicles available to a foreign producer to explain the price differential away. The adverse effect that flows to the domestic industry or industries is very large.

The third issue that pertains to Commerce is the area of subsidies.

Because a great deal of what happened in the 1979 act and title I was focused on countervailing duties, we have to acknowledge and we are pleased to acknowledge that the International Trade Administration has done a significantly better job in the countervailing duty area than it has in the antidumping in certain respects.

In the steel cases, two very major steps forward were taken in our opinion. One was the recognition that foreign companies have received benefits where the company or companies may be deemed uncredit worthy, and hence the benefits or the value of the subsidy to them would be greater than it would be to a highly credit worthy company. Second, the ITA has recognized that there is a time value to money. There are quite a few controversies that remain as to how you measure that benefit, but at least the time value of money concept has been recognized.

What has been particularly disturbing to domestic industries that have appeared before the Commerce Department—am I exceeding my time, Mr. Chairman?

Chairman GIBBONS. Go ahead.

Mr. STEWART [continuing]. Has been the very narrow reading of the term "subsidy" that has been adopted by the agency, despite the repeated focus of the Congress that subsidies and dumping are two of the most pernicious practices that can distort international trade to the disadvantage of American industry. Let me give you an example.

A concept has been adopted by Commerce that is called "the generally available theory." If a program is "made generally available" to industry in a country, it is deemed not to be countervailable.

I think Mr. Horlick expressed some of the reasons for that this morning. They are concerned that U.S. companies exporting abroad may be subject to similar countervailing duties for programs to which they are recipients. The unfortunate result of that theory is that you come up with absolutely absurd results.

You give foreign governments an incentive to develop a positive program under certain verbal rubrics, if you will, that permit them to escape the reach of our law, a result that we do not believe is warranted.

In the steel cases, as an example, in the case of steel from Belgium, there were two programs that were involved. One program was a regional program, which by mandate of Congress clearly had to be found to be countervailable. The second program, which provided virtually identical benefits, was "generally available."

The ITA was confronted with two steel producers in Belgium, one located in the region that had the regional benefit, and one located in the rest of the country where it had the general benefit, virtually the same amount of money or similar amounts of money provided to both companies, and presumably the same distortive effect as to the comparative advantage. One program was found to be countervailable, and one program was found not to be countervailable.

In the case of steel products from Germany, a regional program was provided by one of the German states. Because the German state offered it to all producers allegedly within that state, which was a region of the country, the ITA said that while that benefit conferred by the national government would be countervailable, clearly it cannot be countervailable if it is offered by the state.

So you have a system where very large sums of money can be funneled into the foreign producers for undoubtedly very good policy reasons of the foreign government, or a foreign state, but which have the effect of changing the comparative advantage of that foreign producer vis-a-vis the U.S. producer.

We believe that the law has been unnecessarily restricted in its interpretation by the agency in reaching many of the problems that can occur, that are not unfair in and of themselves, but are unfair to the extent that they deny an opportunity to U.S. industries. Targeting is a classic example.

We believe that this can in part be addressed, if not to a significant extent, under the countervailing duty law. In the steel cases and other cases, we had the opportunity to argue that in valuing the benefit to the recipient, which the Commerce Department has agreed is the proper methodology, in looking at the benefit, you have to look at the risk profile at the time the benefit is given.

You will recognize, Mr. Chairman, that when you are talking about seed money that you would get from a venture capital operation, if you were starting up or exploring into a new area, you would have a very high, what in financial circles would be called hurdle rate. It might be 30 percent, or you might expect 40 percent or 50 percent return on your investment, that is a high risk kind of venture.

It does not take very much imagination to see that if you are looking at a high return on a risky investment that pays out in a foreign country, in the context of targeting from a small amount of seed money, that in terms of the countervailable benefits down the road, they can be significant.

Interpreting the statute so that countries cannot start and stop, start and stop infusions of large amounts of money and have the foreign government say, "We have stopped. We no longer give $1 billion a year to the XYX Corp., so you can't countervail against us."

Where you interpret the reach of the law, which it is not mandated by the Congress that it has to be narrow, would do a lot in our opinion to resolve many of the issues that are presently before you, the problems that confront the domestic industries.

Now in the area of the International Trade Commission. We have identified in our testimony eight specific areas that we believe need urgent attention. One I have already mentioned which is the availability of confidential pricing information to counsel for the domestic industries, so that they are put on an equal basis with counsel for the foreign respondents before the agency.

We believe that when the chairman of Motorola was before you on the 16th, he indicated that injury to a domestic industry can occur through a reduction in its cash flow, through the inability to maintain high enough gross margins to reinvest, particularly in the high technology industries such as the semiconductor industry.

In our opinion, the ITC has taken an overly restrictive view of what constitutes injury. We have provided a number of examples and a number of recommendations in our proposed testimony. The first deals with the area of amount of time necessary to show material injury.

Congress defined material injury as that which is not inconsequential and immaterial. In our opinion, the standard has not been interpreted that way. If companies are impacted seriously in one quarter or over a 6-month time period, they are not suffering threat of injury at that point in time, they are suffering injury.

The standard operating procedure for the ITC has been to look at a span of years. By looking at a span of years, if an industry comes forward saying, "We are getting hurt and we are getting hurt seriously by country A or country B, or 10 countries who for one reason or another have started an export push to the United States of this product," they cannot as the law is currently administered get a determination of material injury. Such a result is not statutorily required. It is not required by the legislative history. It is not required by the agency's regulation. It is simply a matter of present practice by the commissioners.

The statistics that Mr. Ervin reviewed with you previously about the preliminary determination indicate that somewhere over 40 percent of countervailing duty determinations were terminated at the preliminary stage. Roughly one-third or one-quarter, I believe, of the antidumping cases were terminated at the preliminary stage. We believe that that is a fair indication that the material injury standard at the preliminary stage is being misused.

The legislative history is clear that the only purpose of the preliminary investigation, other than to bring us in compliance with the antidumping code that was negotiated in 1979, was to weed out the strictly frivolous cases.

We have consulted with many, many domestic industries about bringing cases, and many firms chose not to bring cases because they don't believe they have a shot at ultimately getting the material injury determination, or we would so advise them.

The cases that we have seen, that have been brought and that are terminated, we believe result, by and large, from an overly strict interpretation of the standard. These are not frivolous cases that are being thrown out, not frivolous at all.

We have recommended the following types of solutions to the problems that exist before the ITC. The most dramatic in our opinion is creating a rebuttable presumption of material injury where two factors are present, (1) increased market penetration and (2) evidence of underpricing or price depression—the two major standards that are identified in the GATT code. We believe that if a domestic industry can show that, they ought to be entitled to relief.

The focus that is put on by the International Trade Commission on information such as lost sales information, in our opinion, is overly confining. It does not take into account the dramatically different structure of domestic industries and the much greater difficulties that domestic industries have in obtaining information about lost sales, particularly if the lost sales are their customers' lost sales, where they are losing business to their customers because their customers can't sell against the foreign competition.

Two, we would eliminate the preliminary determination in terms of the conference in those situations where the International Trade Commission does not have a reasonable doubt that there was material injury based on the petition and the questionnaire responses.

A lot of time, a lot of effort, as Mr. Ervin has discussed, goes into that preliminary investigatory period of 45 days. If the purpose of the preliminary determination is to weed out frivolous cases, in our opinion most, if virtually not all, of the cases should pass on to a final determination stage, and the standard in the proceedings can be dramatically simplified and dramatically reduced.

If the Commission has questions, serious questions about whether the preliminary standard has been satisfied, they should notify the parties as to what those issues are, so that the energies can be funneled into addressing what is the industry or some other aspect that is of importance to the Commission, without a great deal of energy and time being devoted to matters that clearly are not important.

Third, as Mr. Ervin suggested, there is great concern by domestic industries with the agency's present practice on cumulation. We do specifically request that the Congress require the International Trade Commission to cumulate where the product is fungible and where cases are brought simultaneously.

Not only in the steel cases, but in many others, there are multiple petitions that are filed against a variety of countries, some under the antidumping laws and some under the countervailing duty law, that are causing a common problem to the domestic industry.

Despite recognition by the Commission that the products are fungible, they are not being cumulated. One by one, negative decisions are being turned in where a domestic industry is not having a fair chance.

Finally, with respect to the International Trade Commission, we would request that the statute be changed to provide, at the discretion of the domestic industry, that they only be required to go through one hearing.

American Spring Wire, and Florida Wire and Cable, two of the companies that we represent here today, filed a series of petitions, and because of disparate time periods that can occur between an antidumping and a countervailing duty case, where a country decides to become a signatory in the middle of a case, we went through, I believe, four or five hearings, final hearings before the Commission, on basically the same facts on imports from different countries. This was an enormous waste of time and manpower not only by the domestic industries but also by the Commission.

Turning to the question of judicial review. There is a serious misunderstanding, I believe by some of the statements that have been made in other days and today, as to the existence of interlocutory review rights.

First of all, there are no rights of interlocutory review against ITC decisions. The only ITC decision that can be appealed is a negative, and the fact that it is preliminary is beside the point, the case is over. The case is dead when that preliminary comes down from the ITC. So the ITC has no interlocutory appeals, and the system will not be improved by eliminating interlocutory appeals for them.

Second, with respect to the ITA. There is only one form of interlocutory appeal that is presently on the books that is of any significance, and that is the right to appeal a negative preliminary determination by the ITA as to a program being a subsidy or dumping being found.

In our review of cases brought before the ITA that have been appealed, the issues that are appealed are issues that the ITA as a matter of policy will not reverse itself on in a final determination.

So the distinction that exists is whether a domestic industry will have an opportunity, feeling itself materially injured, to speed up the process of hopefully getting a reversal and having some effective relief against the program, or whether it will have to wait, not the 45 or 75 days it takes the ITA to make the final determination, but to the time period that it takes the ITC, and the time period after that in which either an antidumping or countervailing duty order gets published.

We believe that it is important, and the Congress recognized it as being important in the 1979 act and the legislative history, that the domestic industries in those situations have the right of immediate appeal.

We have also requested that the law be expanded to include two additional areas of judicial review, one of which goes, I think, very much to the question of whether relief is necessary on a more retroactive basis, or whether you need to compress that preliminary determination when the suspension of liquidations first takes place.

Congress has provided, by the critical circumstance provision in the law, a vehicle for getting retroactive suspension of liquidation in 90 days. Our belief, as to the legislative history, is that the intent of Congress was that where an exporter or a U.S. importer tried to beat the investigation and front-load its shipments, that such retroactive relief would be possible.

Certainly that would help the domestic industry in terms of the potential negative impact of the time period from the filing of a petition until the preliminary determination.

The agency, the ITA has very narrowly viewed the rights to retroactive suspension of liquidation, and U.S. industries are not provided meaningful judicial review. The Congress recognized in the legislative history that most entries are liquidated within 6 weeks. The preliminary determination on critical circumstances occurs probably 6 months before the domestic industry has a chance to get in court, if the industry has to wait for the final ITA determination, by which point the issue is moot, because all of the entries have been liquidated.

The court has suggested that there is no right to judicial review, and we believe the Congress should amend the statute to specifically provide for judicial review of negative critical circumstances determinations, because for all practical effects it is a final determination by the ITA.

Another issue that we believe needs expansion in the area of judicial review is the final ITA affirmative determination where there has been a subsequent negative ITC final determination.

Mr. Ervin mentioned that there is a great deal of controversy at the Commission at the present time as to whether or not, in proving the "by reason of" standard under the statute of material injury, the commissioners should look at the size of the dumping margins or the size of the net subsidy and relate it to the margin of underselling.

Two of the present commissioners do not believe that that is necessary. We, as representatives of domestic industries, strongly support that position. That has not been the position of many commissioners in the past, and it is not the position of one of the commissioners at present.

We believe that the domestic industry needs to have the right to choose how it wishes to proceed in court against the ITA on very small margins, affirmative margins that were found, or against the negative ITC, whichever it believes would most expeditiously provide the relief that it believes it is entitled to.

Mr. Chairman, that concludes my summary of our remarks. There are many other recommendations that we have made which I have not taken the time to review, but which I hope will be of assistance to the committee.

[The prepared statement and supplemental material follow. Oral testimony continues on p. 845.]

STATEMENT OF TERENCE P. STEWART, LAW OFFICES OF EUGENE L. STEWART

EXECUTIVE SUMMARY

Mr. Chairman and members of the Subcommittee on Trade. Thank you for the opportunity to appear today on behalf of my father's law firm as special counsel to domestic producers with extensive experience in the attempted use of the U.S. trade laws whose administration you have under review.

Our prepared testimony submitted on April 12th consists of 198 pages in text and exhibits. Out of our firm's 25 years of experience in handling scores of cases for domestic industries seeking relief from unfairly traded, injurious imports, we have identified six broad problem areas which urgently require your attention, five of which address unfair trade practices covered by Title VII of the Tariff Act of 1930, as amended.

First, the ITA's annual reviews of outstanding antidumping duty and countervailing duty orders for the assessment of duties on past imports, and the establishment of the rate for the deposit of estimated duties on current and future imports, have not accomplished their intended functions of (1) neutralizing the market disruptive effect of dumping and foreign government or private foreign industry intervention in U.S. commerce through subsidies, (2) providing for prompt assessment of duties owed, (3) permitting full and meaningful participation by domestic industries in the administrative proceedings in which these crucial determinations are made.

Second, the decision-making concepts and policies of the ITA in antidumping cases have resulted in a system which too often explains away market disruptive price discrimination. The Congressionally intended elimination of dumping has been reduced largely to the exculpation of dumping.

Third, by narrowly construing the Congressional definition of "subsidy," the ITA has shielded foreign producers and exporters in many instances from the Congressionally intended neutralization in the U.S. market place of the disruptive competitive advantage conferred on foreign goods by the economic benefits of foreign subsidy programs.

Fourth, the ITC has placed an unreasonable burden of proof on domestic producers in interpreting the injury test in antidumping and countervailing duty cases. Its decision-making criteria ignore the commercial reality of the effect of dumped or subsidized imports on competition with domestic products. The result too often has been denial of the assessment of duties intended by Congress to off-set the unfair competitive advantage in the U.S. market of foreign price discrimination and foreign subsidies.

Fifth, domestic producers' rights to judicial review of adverse administrative determinations, which the Congress made available for the first time in the 1979 Trade Agreement Act and the Customs Courts Act of 1980, have been limited so as to deny meaningful review of decisions on the key issue of critical circumstances and the proper measurement of dumping margins and net subsidies where there has been a negative final ITC determination.

Sixth, the U.S. escape clause remedy has been interpreted by the Commission, and the President, so as effectively to deny to most seriously injured domestic industries the temporary respite from increased foreign competition which the Congress intended. Lost to the majority of applicants has been the opportunity to adjust to such competition by the restoration of market conditions which would enable injured domestic producers to secure the capital investment required to adjust to the competitive strength of foreign producers enhanced by the President's reduction or removal of tariff protection in trade agreement concessions.

To cope constructively with the need for reform in these six problem areas, we have presented twenty-five specific suggestions for statutory or administrative change.

In keeping with the intent of these hearings, we have applied our judgment to recommending changes in law and regulation to provide speedier, more cost efficient, relief for job losses and economic injury caused domestic industries by unfair methods of competition from imports, or from crushing increases in imports.

In our analysis we have addressed the following key questions:

(1) How can the intent of Congress be made effective to offset the unfair advantage of dumping or foreign subsidies by which imports are enabled to weaken the ability of domestic producers to innovate and compete with imports?

(2) How can serious injury caused by rapidly increasing or long continued imports which disrupt domestic markets, deny capital investment, and prevent adjustment by domestic producers to the conditions of competition created by tariff and trade concessions in trade agreements be remedied?

(3) Especially, how can smaller industries, firms, and groups of workers, with their limited resources, secure the relief intended by the Congress in administrative decision-making under the present structure of Title VII of the Tariff Act and the escape clause?

Some changes in the 1979 Act have contributed to improvement in the administration of the unfair trade laws. The most important change is the requirement for an annual review of antidumping duty and countervailing duty orders (Section 751) in which domestic parties may comment on information submitted by foreign interests, present rebuttal information of their own, and comment on the methodology used by the administering authority in calculating dumping margins, and the value of net subsidies.

There are, however, ten significant problems that impair the relief that a domestic industry can anticipate from a Section 751 review as presently conductd by the ITA

One formidable obstacle is the severe budget restraints affecting the Compliance Division of the ITA. Some proposals suggested by other speakers would cope with budgetary constaints by simplifying calculations or otherwise eliminating attention to concepts vital to the meaning of the law. We believe such expedients are not in the best interest of domestic industries.

In addition, there are nine ITA procedural or policy problems that needlessly complicate a 751 preceeding, increase the cost to all parties (not just domestic industries), and reduce effective participation by domestic industries in the annual review process:

(1) the failure by foreign producers to submit a meaningful non-confidential summary of their confidential responses to the agency's questionnaire;

(2) the failure of the ITA to deal in a timely manner with complicated or controversial cases because of limited manpower or policy positions of the agency;

(3) the unwillingness of the ITA to consider the only information reasonably available to domestic industries in rebutting foreign respondent data.

This consists of reports of the responsible research of experienced, independent foreign market research organizations, which should be, but are not, accepted as probable cause for further investigation of facutal issues challenged by domestic industries;

(4) the practice of the ITA of permitting foreign producers to submit incomplete responses to the ITA's questionnaire, but to provide the missing information during verification which excludes it from disclosure to domestic parties.

The ITA refuses to make such information available to counsel for domestic producers under administrative protective order. This prevents domestic producers through counsel from rebutting foreign producer information;

(5) the ITA's practice of extended, often quite delayed, consideration and action on applications by counsel for domestic producers for disclosure of confidential information under administrative protective order.

This operates to deny domestic producers meaningful opportunity to study, evaluate and prepare for timely consideration rebuttal information to data and claims submitted by foreign respondents.

This denial of access to key information and claims of foreign parties occurs despite recognition by the ITA that such information is vitally important to meaningful participation by domestic parties;

(6) the ITA's failure annually to investigate foreign respondent undertakings not to sell previously dumped goods in the United States at less than fair value.

Such undertakings are required as a basis for dicontinuances of investigations. Refusal by the ITA to monitor or review such undertakings is contrary to the agency's regulation.

The effect of the ITA's practice is to license foreign firms previously determined to be engaged in dumping to resume the practice immune from potential antidumping duty liability;

(7) the ITA's refusal in conducting Sec. 751 review of pre-1980 dumping findings to examine or evaluate the information considered by the Treasury Department in its preparation prior to 1980 of antidumping duty appraisement instructions in the form of "master lists".

These are accepted without evaluation by the ITA in its current review of unliquidated entries of goods subject to the pre-1980 finding of dumping as the basis for the ITA's determination of duties assessable, or, as is often the case, of revoking the finding of dumping. Yet, domestic producers are prevented from evaluating, commenting upon, or rebutting the ITA's basis for its Sec. 751 action;

(8) the ITA's refusal to allow domestic interested parties to participate in that phase of antidumping and countervailing duty investigations in which the ITA's representatives verify the accuracy of the information submitted by the foreign respondents in questionnaire responses.

During verification, respondents commonly supply considerable information not previously set forth in the questionnaire responses. This information is made a part of the verifying officer's report as confidential exhibits.

The nonconfidential version of the verification reports themselves are delayed in preparation and availability to domestic producers. The exhibits are absolutely withheld from domestic parties, not even being released under protective order. The result is denial of meaningful participation by domestic industries in a vital stage of the investigation, the verification process;

(9) the practice of the ITA in granting adjustments to home market prices which have the effect of explaining away margins of dumping without being based upon evidence of record. This results from the use by the ITA of assumptions and policy decisions which in effect put the burden of proof on domestic producers to rebut proposed adjustments.

The statute intends that no adjustment which has the effect of reducing or eliminating margins of dumping be allowed except upon the basis of clear and convincing evidence submitted by foreign producers establishing that the claimed adjustments are reasonably identifiable, quantifiable and directly related to the sale of the merchandise under investigation.

We have made proposals addressing each and every one of these issues in our full statement, including the need for greater appropriations.

We have provided a blueprint, we believe, to a much more orderly conduct of 751 review than presently practiced by the ITA. Our proposed reform would provide meaningful opportunity for substantive participation by the domestic industry in the making of the record which is required by law to be the basis of the ITA's determination. Such participation would come at several points during the review: after the original questionnaire responses and initial analysis by the ITA case handler; during the verification process; and after the proposed preliminary determination.

We propose the automatic release of information submitted by respondents in confidence under the safeguard of a standard administrative protective order. We stress also that the existing requirement for the party requesting confidential treatment to submit for the public record a meaningful non-confidential summary of the confidential information should be enforced by the agency.

These reforms would permit the domestic industry and its experts to evaluate and comment on the record for consideration by the ITA concerning the factual and legal status of the foreign respondent's information and claims. Such reforms would eliminate the extensive delays now involved in obtaining release of the key substantive information to domestic industry counsel under administrative protective order.

The second problem area that we address in our prepared testimony is the substantive questions affecting the administration of the antidumping law.

We indentify in our prepared testimony a wide range of interpretations by the ITA that have had the effect of explaining away major amounts of price discrimination occurring between sales in the home market and sales for export to the United States.

The so-called "exporter's sales price" offset is a major problem in the administration of the law. The reform by statute of the exporter's sales price offset, not adopted by regulation by the Treasury Department until 1976, would dramatically improve the effective administration of the antidumping law.

Other practices and policies of the ITA have a similar major negative impact on the Congressionally intended administration of the law by explaining away major amounts of price discrimination without corrective action. These include:

(1) the allowance of adjustments for differences in circumstances of sale in transfers between related parties. This practice of the ITA is contrary to statute and legislative intent.

The exporter's sales price is prescribed for use by the Congress as a proxy for an arms length price in related party transfers, a concept which by definition does not reflect circumstances of sale such as pertain to transactions between unrelated parties;

(2) the ITA's practice of averaging home market prices, US prices and all adjustments with the result that selective price discrimination is concealed and thus removed from the reach of the law;

(3) the refusal by the agency to honor the explicit prerequisite which Congress has specified must be satisfied before any adjustment may be made for alleged differences in circumstances of sale, differences in merchandise, or differences in quantity. This is the "causal-link issue".

That prerequisite is that it must be established that the differences in the prices being compared are in fact due to the claimed differences in circumstances of sale, merchandise, or quantities.

(4) the failure of the ITA to deduct a reasonable profit on the resale of a product in the United States in determining the United States price under the exporters sales price provision;

The derivation of a constructed arm's length price to serve as a proxy for value on a transfer to a related party clearly calls for subtracting from the arm's length price at which the merchandise imported by the party related to the foreign exporter is resold in the United States all markups added in that resale. Price—markup=a realistic measure of the value of the goods as laid down in the United States.

The ITA refuses to deduct the profit increment of the markup; thus the price it derives is only half a proxy. The missing half is a shield againt the true measure of dumping which ought to be, but is not, corrected.

Issues such as the exporter's sales price offset and the "causal link" are now being litigated in court. The court has shown undue deference to the agency's assumed expertise in formulating these practices. The Congress, however, has the duty in this legislative oversight to determine if these dumping-exonerating practices are in keeping with the legislative intent. We believe they are not.

At the core of the ITA's improvident allowance of adjustments to home market price, and its failure to adjust United States price to achieve the price comparison intended by the Congress, is its willingness to assume the existence of threshold facts which the Congress ordered it to find on the basis of evidence of record.

I speak of the ITA's assumption that differences in costs are equal to differences in prices. It automatically allows adjustments for differences in circumstances of sale, in merchandise, and in quantities merely on a showing of differences in the costs incurred in the markets whose transaction prices are being compared. The agency has adopted an irrebuttable presumption that any difference in cost results in a difference in price equal to the cost difference. This repeals the basic tenet of free markets that price is a function of the interaction of supply and demand. It also effectively repeals the Congressionally intended measurement of dumping and the amount of off-setting duties to be imposed to neutralize international price discrimination.

The third major problem area we address is the ITA's restrictive, relief-curtailing administration of the countervailing duty statute.

I must acknowledge that there are two affirmative aspects of the ITA's determination in the recent steel subsidy cases. These are: (1) the acceptance by the ITA of the concept of the time value of money, and (2) its recognition that the objective value of grants, equity infusions and preferential loans to foreign producers is affected by the noncreditworthy status of firms receiving subsidy benefits.

But there are a number of major areas where the agency has chosen to interpret the law in a very restrictive sense, in a manner that permits benefits to be received by foreign producers and exporters—which have the effect of reducing the cost of production, cost of borrowing money, cost of supplies—not to be countervailable. These include:

(1) The issue of whether benefits generally available are countervailable; i.e., where a program is allegedly available to all industries in a society or to a large number of such industries. It is the agency's present practice not to find such programs countervailable.

As this committee is aware, one of the major concerns of domestic industries prior to the 1979 act was the failure of the Treasury Department, then the administering authority, to countervail against regional grants. The Congress specifically intended that this abuse be corrected in enacting the 1979 Act. But the ITA, as successor to Treasury, is limiting its determination of subsidies as closely as it can to anything which it construes to be more widely available than in a region.

So we have the following paradox: a grant provided only to producers in a single region will now be found to be countervailable, but an identical benefit provided to producers in more than one region is found not to be countervailable.

For example, a situation arose in Certain Steel Products from Belgium where there were two laws that provided virtually identical benefits. One was limited to one particular geographical region of Belgium. The other was deemed by the ITA to be generally available to industries throughout Belgium. One steel producer was located in the particular region targeted in the first program; another steel producer was located outside of that region. Each received comparable government subsidies. The exports to the U.S. of the first producer were found to be countervailable; but not the second producer's.

Such a paradoxical result does not contribute to putting an end to unfair, foreign government subsidized competition from foreign products in the U.S. market. It merely results in the restatement of singular or regional subsidy programs into programs which are made to appear to be of general availability.

(2) A very important issue for domestic industries, including high technology industries, is how the ITA handles downstream subsidies. The ITA refuses to consider countervailable any subsidies to intermediate products which are incorporated in final products exported to the United States.

Steel is a major component in automobiles, and in many countries is heavily subsidized. The position of the ITA is that no benefit is received by the foreign auto industry in its purchase of locally produced, subsidized steel. The ITA believes it is in the steel producer's interest not to pass along to the auto manufacturer the subsidy benefit which lowered its steel production costs. We believe that economic assumption is without merit. It ignores the very real indirect benefits that flow to a home market producer of final products from its ability to purchase at prices below the home market supplier's fully developed cost, before reduction by subsidies, the intermediate products which it uses in its production.

(3) The ITA has refused to countervail the net subsidies conferred by governments using a cascade added value tax system through the excessive remission of taxes on exports. Thereby, the ITA has provided a safe harbor in the U.S. market for foreign products which in fact are subsidized by the manner in which foreign governments under cover of their tax system transfer public revenues to underwrite production for export.

The vice of the ITA's practice is its uncritical acceptance of foreign government formulations and rationalizations of their export-promoting tax remission programs, without meaningful, independent, expert analysis.

(4) The ITA has to all intents and purposes repealed the critical circumstances provision of the unfair competition laws by impossibly strict interpretation of the statutory prerequisites for its use.

The Congress was aware that once an antidumping duty or countervailing duty investigation is initiated, there is a delay of from 85 to 120 days before a preliminary affirmative determination can occur and operate legally to suspend liquidation of consumption entries of the imported merchandise under investigation. During this period, knowledgeable exporters and their import colleagues can accelerate exports to the United States for clearance through Customs ahead of the suspension-of-liquidation date.

Congress recognized that injured industries who petition for neutralization of the unfair competitive advantage of dumped or subsidized imports can be further irreparably injured by this practice. To prevent such added injury while a case is under investigation, Congress provided for determinations by the ITA that if there is a history of dumping of the merchandise under investigation, or the importer should have known the purchase price was a dumping price, or the subsidies received by the foreign producer are inconsistent with the definition of countervailable subsidies in the International Countervailing Duty Code, and there are massive imports in a relatively short period of time, then the effective date for the withholding of liquidation will be moved back 90 days prior to the date of the preliminary determination.

The ITA has denied this safeguard against added injury in the vast majority of cases. The intent of Congress has been ignored.

(5) The ITA has nullified the relief intended by Congress in countervailing duty cases again and again by suspending the investigations at the preliminary determination stage on the basis of agreements by foreign governments or exporters to divert, terminate or renounce the subsidies at some date in the future. The intent of the Congress that such suspension agreements be entered into only if they serve both the national interest and the interest of the domestic industries injured by the subsidized imports has been given meaningless lip-service.

The objections of domestic industry have been ignored. The ITA has ignored the plain instruction in the statute that domestic industry be consulted before such agreements are entered into. It "initials" the agreements, tells the industry about the agreement—already set through the ITA's discussion with the foreign interests—and then ignores the domestic industry's protests. In not a single case has the ITA withdrawn the initialled agreement after the domestic industry expressed views in the belated opportunity given it by the ITA.

(6) The Congress itself with the willing cooperation of the Executive Branch has placed U.S. industries at a major competitive disadvantage both in the U.S. and abroad by the manner in which it has directed that the foreign government promotion of exports through remission of taxes be handled by the ITA in its administration of the antidumping and countervailing duty laws:

First, the 1979 Act in defining "United States Price" requires that there be added to the price at which the foreign goods were sold to the United States the amount of taxes directly imposed on the exports which have been rebated or not collected.

The effect of this is to confirm the foreign producer in his competitive advantage in accepting tax subsidies to underwrite the expansion of his exports to the United States, and at the same time to safeguard from off-set through antidumping duties that part of his discrimination in price in selling to the U.S. based on such tax remission.

Further, the ITA assumes and does not require proof of the companion requirement specified in the Act that such addition will be made only to the extent that such taxes are added to or included in the price of such merchandise when sold in the country of exportation.

Second, in the legislative history of the 1979 Act, it is stated that the administering authority is not prohibited "from determing that export payments are not subsidies, it those payments . . . are specifically provided as non-excessive rebates of indirect taxes within the meaning of" the international Subsidies/Countervailing Duty agreement. (S. Rep. 96-249, pp. 84, 85).

Thus, the Executive Branch, in accepting the disparate treatment of direct and indirect taxes, and the Congress, in ratifying this difference of treatment in the legislative history, have combined together to confront domestic industries with a major competitive disadvantage vis-a-vis their foreign competitors. [See J. Nevin, Doorstep for Free Trade, 61 Harv. Bus. Rev. #2, 88 (1983)].

In our prepared testimony, submitted to the Subcommittee on April 12, we not only discuss these problems in detail, but also propose specific reforms by statutory or regulatory change.

The fourth major issue concerns the substantive and procedural problems in the administration of the material injury provisions of Title VII of the Act by the International Trade Commission.

As virtually all antidumping or countervailing duty cases require an injury test both at the preliminary and final stages of an investigation, a key hurdle for domestic industries seeking import relief is the ability to satisfy the ITC that the statutory criteria of material injury have been met.

We have identified eight problems of major significance in the administration of the injury portion of the unfair trade laws that make relief more difficult to obtain than we believe was the intent of the Congress:

(1) the ITC's reluctance to evaluate the injury being caused domestic industry by dumped or subsidized imports over the short term.

If there has been a recent surge in imports in a static or declining domestic market, the material injury being caused or threatened must be mesured during the span of the recent surge—calendar quarter by calendar quarter, not in the retrospective of a span of years.

Despite frequent urging, the Commission has declined to adapt its decisionmaking process to consider such short term injury data.

(2) the ITC's refusal to make available to counsel for domestic producers under protective order the confidential price information of foreign producers and their U.S. importers.

The commission makes available the price and cost information of domestic producers automatically upon application by foreign interests, and without any reference to domestic producers. But it construes Sec. 777 (c) of the Act, on the basis of the legislative history, as precluding reciprocal treatment of domestic producer applicants.

The effect is that the ITC gives foreign interests access to complete information with which to argue their cases, while denying equal treatment to the domestic industry.

(3) the very broad discretion exercised by the ITC in weighing the facts under the criteria of material injury has resulted to a substantial degree in the denial of relief to industries suffering import competition aided by price leverage based upon dumping or cost-offsetting foreign subsidies. This leverage is used constantly to undersell the like domestic products regardless of how vigorously the injured domestic producers attempt to hold their business through reactive price reductions.

The ITC has failed signally to interpret the material injury test in accordance with the relaxed standard which the Congress carefully wrote into the law, as harm which is not inconsequential, immaterial, or unimportant.

(4) the ITA places overemphasis on specific examples of lost sales or price suppression regardless of the industry structure or the nature of the distribution system;

The Commission insists upon confirmation by its staff from the purchasers of the dumped or subsidized foreign merchandise that they have purchased the foreign rather than the domestic goods on the basis of price. Purchasers know the significance of the ITC's inquiries, and to retain for themselves the economic benefit of the low dumped or subsidized prices, they usually find some other "reason" for their purchase, which is uncritically accepted by the ITC.

The result is that contrary to the intent of Congress, relief is being denied in a large number of cases solely because of an extreme burden of proof being placed on domestic industries to prove the impossible. Domestic industry documentation of lost sales and price suppression is ignored on the strength of self-serving, unverified assertions by purchasers whose intent is to cling to the perceived economic benefits of the low prices which characterize unfair competition.

(5) the present mode of handling the two injury determinations by the ITC which is, in our opinion, unnecessarily wasteful of resources both at the agency and at the interested party level and which could be better served by simplifying procedures;

(6) the ITC's interpretation of its broad discretion on matters remanded from the Court of International Trade, resulting in the virtual elimination of judicial review of agency action—for example, there has been no case in which the ITC has changed its position regardless of the legal or factual errors found by the court to exist in the ITC's original determination;

(7) the ITC's failure to cumulate imports of the like product concurrently being investigated from a number of countries, in situations where the product is admittedly fungible;

(8) the need for domestic industries in concurrent investigations under the antidumping and countervailing duty laws to participate in a series of hearings and submit a series of briefs and questionnaire responses instead of having the related cases considered simultaneously.

We have proposed a series of modifications to the statute or to agency practice to rectify these problems. The result of these practices is relief being denied or severely restricted in contradiction of the intention of the Congress in 1974 and 1979 in reforming the unfair competition statutes.

First, our most far reaching proposal pertains to the inclusion of a rebuttable presumption of material injury where there has been an increased share of apparent consumption by imports and the presentation of evidence indicating price suppression or undercutting of domestic goods by the imported product.

Second, we propose elimination of the preliminary determination conference unless the Commission believes there is not a prima facie indication of material industry. In such event, we propose requiring the agency to notify the interested parties of the factual and legal issues underlying the Commission's doubt that a prima facie case exists, permitting the domestic industry to request a conference for the presentation of evidence and views on those issues.

Third, we recommend that when the Court of International Trade decides that the ITC's judicially reviewed determination is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or is otherwise not in accordance with law, the ITC assign the case to staff personnel not involved in the original investigation.

The Commissioners assisted by the newly assigned staff personnel would be required to give a de novo review to the entire record. The staff would be required to prepare a new staff report and place it upon the public record prior to the Commission's decision on remand. Interested parties would submit views with respect to the issues explicitly or implicitly regarded by the Court as germane to its remand of the case, and the staff report's discussion of those issues.

Fourth, the statute should be amended to provide that, in the petitioner's discretion, where multiple cases have been filed, all hearings in the final injury investigations will be heard concurrently.

Finally, we recommend that by amendment to the statute, the ITC be required to cumulate imports of like merchandise from all countries under concurrent investigation where the merchandise is fungible, is sold through common channels of distribution, and is sold in the principal markets in which the like domestic merchandise is sold.

The fifth problem which we discuss and for which we propose reforms in the law, is the limitation on domestic industry's present rights to judicial review.

We disagree with the statement contained in a press release from the subcommittee and contained in Mr. Olmer's prepared testimony that the Congress should consider limiting rights to judicial review on "interlocutory" matters.

The challenged determinations appear to be those identified in subsections of Sec. 516A(a)(1) of the Tariff Act of 1930. A review of those subsections, however, shows that two are not interlocutory but rather final within the normal meaning of that term in administrative law practice. Two of the other determinations were specifically discussed during the floor debates in the Senate on the 1979 Act as requiring judicial review. The reason is that by their nature prompt review of the agency determination is required to prevent the loss of rights of the affected domestic industry as a result of arbitrary and capricious agency action.

We urge the present statutory basis for judicial review of these preliminary negative determinations by the ITA or the ITC be maintained without change. In addition, we recommend that the rights of judicial review be expanded to include two areas that were inadvertently omitted from the scope of Section 516A of the Act:

(1) preliminary negative critical circumstances determinations by the ITA;

(2) final affirmative determinations by the ITA prior to an affirmative ITC determination or after a negative ITC final determination of injury.

As the legislative history of the critical circumstances provision make clear, if relief retroactively is not provided quickly, no relief will be available as most entries are liquidated in a six week time period. When a negative preliminary critical circumstances determination is made, the Courts have suggested that there is no right to immediate judicial review. Where liquidation is not suspended, domestic industries' right to retroactive relief is effectively negated, even if the agency reverses its preliminary determination later in the investigation. What is in effect a final determination should be judicially reviewable at a time when correction of agency error can be meaningful.

Similarly, the legislative history makes clear that domestic industries have the right to contest not only whether there are subsidies or dumping but also the amount of countervailing duties of antidumping duties required to off-set these unfair forms of competition. The Justice Department has fought strenuously in the last year to prohibit domestic industries from securing judicial review of these amounts where there was a negative final ITC determination or prior to there being a final ITC determination. Yet, ITC commissioners have found the size of the net subsidy or the dumping margin to be material to their determination of injury.

The last major problem which we discuss and for which we recommend statutory reform is the escape clause.

The history of the escape clause had been dismal in terms of results for domestic industries seeking to obtain relief. This is accounted for by the (1) strict limitations for such relief under Article XIX of GATT, (2) the discretion left to the President in affording relief even where serious injury has been proven, (3) the rights of foreign countries that are injured by whatever relief is taken to request compensation and (4) a requirement under the law and under Article XIX of GATT that imports from all countries be covered by the relief.

Because of changes in economic conditions in the 1980's over those prevalent when Congress enacted the present escape clause, we believe it is appropriate for the Congress to reconsider the basic objective and the basic statutory framework within which escape clause relief may be obtained.

One of the concerns of the Congress in the last decade has been the prevalence and nontransparent, non-Article XIX remedies resorted to by foreign countries (and to a limited extent, the United States) to obtain necessary relief from seriously injurious imports, where the obligation to compensate affected countries or the severe standards of the escape clause have ruled out relief via that avenue.

Moreover, sharp fluctuations in exchange rates which have characterized international transactions in recent years, and the foreign government practice of targeting industries for subsidies and cartel-like activity to foster export expansion, require that the escape clause criteria for modification or withdrawal of tariff concessions be carefully reconsidered.

The current justification for escape clause relief is to provide a temporary respite to enable domestic seriously injured by imports (flowing from trade agreement concessions) to adjust to new conditions of foreign competition.

When a currency becomes significantly overvalued for an extended period of time, domestic industries can suddenly find themselves no longer competitive in their home market. This condition stems not from their loss of maufacturing resourcefulness, but rather the perceived effect on the value of the nation's currency by events nation or global in scope. The consequences for domestic industry, without fault on their part, can be debilitating. Cash flow, profitability, and ability to invest in technological leadership can all be unrelievedly impaired.

Similarly, America's competitors can produce the same effect by the application of government funds to selected industries, and the orchestration of their investment in technology to support export expansion in world market dominating scope. Exchange values can remain relatively stable, but destabilization of American industries can be caused by such foreign government targeting, administrative guidance, and support for cartel-like management of key industry investment, expansion and export strategy.

The targeting of selected industries for rapid export expansion should arguably be subject to off-setting or neutralizing import regulation at our borders under our unfair trade statutes (sections 301, 337, and the antidumping or the countervailing duty laws). Such remedies have not in fact been administered so as effectively to cope with this problem.

It is difficult for U.S. industries to find out about and document in appropriate detail the full scope of foreign government programs and benefits conferred upon targeted foreign industries whose expansion strategy includes the take-over of American markets. Few industries can budget the more than one million dollars for researching and litigating such unfair competition reported as required in the machine tools case! An alternative remedy is necessary to address these interrelated problems.

We recommend a revision of the escape clause that redefines serious injury to take account of the fact that a domestic industry can be seriously injured even when it remains "profitable", where the seed corn of its capital is held static, without the growth required to maintain technological and marketing leadership against its subsidized, targeted foreign competitors.

We recommend also that targeting and exchange rate fluctuation serious injury require that the most favored nation provison of the Trade Act of 1974 and our commitment to that principle under GATT be modified to permit selective action against just those imports which from an unnatural economic base are destabilizing efficiently conducted American industries.

We also recognize that it is appropriate that the modified form of escape clause action we recommend include an evaluation of whether or not the relief will facilitate the additional cash flow, profitability, and market share that is necessary to restore, or maintain against demonstrable destructive assualt by targeted foreign industries, the competitive strength of the affected domestic industry.

The relief must be made certain in nature, free from presidential review. The long history of the administration of the act strongly supports this recommendation.

Our prepared statement is comprehensive in discussing each of the problems which I have briefly touched upon today, and in recommending the specific reforms required to solve them.

Our recommendation if implemented will go far in the attainment of the Congressional purpose:

(1) the reduction or elimination of trade practices which distort international competition to the disadvantage of the United States industry, and

(2) a constructive framework within which the United States may come to grips with the problems that the rapid change in technology, exchange rates and interest rates, and foreign government sponsored targeting of export industries have caused, and are causing.

We hope that the members of the Subcommittee, your legislative aides, and the staff of the subcommittee will give careful consideration to the full text of our prepared testimony.

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Introduction and Overview.

Mr. Chairman and other distinguished members of the House Ways and Means Committee. It is a pleasure for me to have an opportunity to appear here today on behalf of my father's law firm as special counsel to a number of our esteemed clients--American Spring Wire Corporation, Carlisle Tire & Rubber Company, Florida Wire & Cable Company, PPG Industries, Inc. (Glass Division), Roses Incorporated, SCM Corporation (Consumer Products Division) and The Timken Company--to present testimony on an issue that is of vital interest to our firm and to the welfare of our clients, viz., U.S. trade remedy laws and how they can be made more effective. Each of the companies on whose behalf I appear today have been active participants before the agencies responsible for the administration of our nation's trade laws and before the courts having jurisdiction over trade disputes for many years attempting to safeguard their rights to effective and vigorous enforcement of our trade laws as repeatedly stressed by the Congress [e.g., H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46, 48-49, 69-72 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979); S. Rep. No. 1298, 93d Cong., 2d Sess. 169 (1974)].

I will be limiting my direct testimony to a review of the antidumping, countervailing duty, and escape clause provisions of U.S. law, areas of immediate concern to the companies on whose behalf our firm appears today, but would be willing to respond to any questions about the other issues raised in the Subcommittee's Releases of February 15 and 25, 1983.

As the Subcommittee is well aware, there is a great deal of litigation before the Court of International Trade and the Court of Appeals for the Federal Circuit on many issues flowing from the administration and interpretation of the antidumping and countervailing duty laws. PPG, SCM, and Timken have each been in the courts for nearly a decade attempting to get clarification of our laws and to obtain the relief each company believes it is entitled to under our unfair trade statutes. Similarly, American Spring Wire, Carlisle, Florida Wire & Cable and Roses Inc. have all been actively involved in litigation flowing from what each company believes to have been incorrect interpretations of the law and a failure by the respective agencies to fulfill the Congressional mandate that "these unfair trade statutes be administered in a manner that will prevent such practices." [H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979)] Similarly, many of our clients and other domestic producers have appeared before this Subcommittee or have reviewed with other members of Congress or the appropriate officials of the concerned agencies what has been perceived to be the exercise of agency discretion in a manner that chooses to favor foreign manufacturers over domestic producers and jobs. [E.g., Testimony of George F. Burns, President, Consumer Products Division, SCM Corporation (and statement in support thereof) before this Subcommittee on December 16, 1981; Comments of SCM Corporation Regarding S. 3015, Before the Subcomm. on International Trade of the Senate Comm. on Finance (November 1982)] For purposes of my testimony today, the legality or propriety of the agencies' interpretations and administration is not in issue. Rather, I appear to present suggested modifications in the law and in the administration practices which, if implemented either by statutory amendment or by modification of agency regulation or practice, would result in a more efficient provision of relief to domestic industries and their workers from unfair trade practices and a more meaningful opportunity to adjust to seriously injurious fairly traded imports.

My intended mode of proceeding is to examine the following broad subjects: (1) annual reviews of outstanding antidumping and countervailing duty orders; (2) other substantive and procedural problems flowing from the administration and interpretation of the antidumping duty law by the administering authority ("the ITA"); (3) other substantive problems flowing from the interpretation of the countervailing duty law by the ITA; (4) substantive and procedural problems flowing from the administration and interpretation of the "material injury" provisions of Title VII of the Tariff Act of 1930, as amended ["the Act"] by the International Trade Commission; (5) existing limitations on domestic industries' rights to judicial review; (6) problems in obtaining relief from seriously injurious fairly traded imports. I will present a brief summary of the areas of concern to the domestic companies our firm represents here today, provide an explanation as to how the particular problem is perceived to reduce the domestic industry's ability to participate fully in the administrative process or to obtain the relief intended by Congress, and will conclude with a presentation of suggested modifications in statutory language, regulations or agency practice that will better achieve the stated Congressional intent of vigorous and effective enforcement of our trade laws.

On my father's behalf and my own, I wish to emphasize that the views we present today are not intended as personal criticism of the dedicated cadre of personnel of the Investigative and Compliance Divisions of the International Trade Administration with whom we have been privileged to work in many, many cases. We believe them to be competent, hard-working, and courageous in their efforts to cope with a work-load which far exceeds the capability of their under-manned groups to address. These divisions are starved for man-power, and the Congress itself must recognize that the amplitude of resources promised in the enactment of the Trade Agreements Act of 1979 has not been provided.

Notwithstanding this acute manpower problem, there are policy problems imposed by the Administration which, in our experience, frustrate the intent of the Congress that domestic industries and their workers have access promptly to meaningful relief from unfair competition and from seriously injurious fairly traded imports.

Issue # 1. Annual Section 751 Reviews.

One of the outstanding improvements in the administration of the antidumping and countervailing duty law from the standpoint of domestic producers was the inclusion in the Tariff Act of 1930 ["the Act"], as amended by the Trade Agreements Act of 1979, of mandatory annual reviews for the determination of duties (if any) owed and the ability of the domestic industry meaningfully to participate in such reviews. [19 U.S.C. § 1675] For the first time, domestic producers have an opportunity to present information, analyze and critique the information submitted by the foreign producers and comment on and critique the methodology followed by the agency in determining the amount of the net subsidy or of the dumping, and, if necessary, to take an appeal to the Court of International Trade. The importance of full and meaningful participation by domestic producers in the section 751 review cannot be overemphasized.

While the agency has, in general, made a good faith effort to move most section 751 reviews along in a timely manner and to permit meaningful participation, a number of problems need to be addressed to assure that prompt action is taken, that meaningful participation is possible, and that the expense to all parties is minimized:

(a) because of budgetary constraints, the ITA's workforce assigned to the Compliance Division is insufficient to process all foreign producer/exporter and foreign controlled affiliated importer questionnaire responses in a timely manner, resulting in (1) significant time delays, (2) determinations not being handed down within twelve months, and (3) an effort by the agency to combine 751 review periods;

(b) because of budgetary constraints, internal conflicts over policy questions or for other unknown reasons, many section 751 reviews either have not proceeded past the stage of questionnaire receipt or have not been decided despite all submissions having been made months (and in isolated instances, a year or more) ago;

(c) numerous foreign producers submit the entirety of their questionnaire response as "Business Confidential," providing no (or a seriously deficient) public summary. Thus, access to any information is granted only to the domestic industry's outside counsel, which effectively prevents the marketing, production and cost accounting experts of domestic producers from assisting counsel or otherwise participating in the proceeding at all;

(d) numerous foreign producers submit incomplete information in their questionnaire responses (both during the original investigations and during section 751 reviews), belatedly and in camera providing the missing information, if at all, only during verification (if one is held). This prevents the domestic industry from securing access to this important information, and denies to the domestic producers who are interested parties any meaningful opportunity to make and present to the ITA any analysis or critique of the foreign producer's claims. Under existing agency practice, documentation submitted by foreign respondents at the verification stage of the investigation is not subject to disclosure to or review by the domestic industry, even under administrative protective order;

(e) because of budgetary constraints and the agency's practice of placing a heavy burden of proof on a domestic industry before investigating issues not apparent from the face of the foreign producers' questionnaire response, market research reports and affidavits supplied by domestic producers which present information on foreign market prices, selling practices, and costs of production which contradict the like categories of information supplied by the foreign producers are not used as a basis for meaningful inquiry or further investigation by the ITA;

(f) the present timing of events in a section 751 review results either in an unnecessarily extended review process or in unnecessary effort being expended by the domestic industry meaningfully to participate in the crucially important Sec. 751 review of the antidumping or countervailing duty order;

(g) in the case of 751 reviews flowing from dumping findings under the Antidumping Act, 1921, the agency has refused to review discontinuances and has refused to permit the domestic industry to have access to information from prior Treasury Department master list proceedings that have been accepted without independent verification by the ITA as the basis for estimated duties or for revocation proceedings;

(h) where questions have arisen with respect to the scope of outstanding antidumping duty orders, the ITA has often permitted piecemeal investigations instead of requiring all such issues to be raised in the context of a section 751 review;

(i) the agency has often not provided the domestic industry with a meaningful opportunity to provide input into planned verification trips so as to permit thorough investigation of the issues of concern to the industry;

(j) the agency has often made preliminary (and if not challenged, final) adjustments to foreign market value without any evidence of record supporting the claimed adjustments.

I take up each problem in turn or in related groups, providing an example from our firm's experience, and then after reviewing all problems, provide suggested solutions, whether statutory, agency regulation or practice.

> (a) The ITA is undermanned to a disabling extent: The ITA's workforce assigned to the Compliance Division is insufficient to process all questionnaire responses in a timely manner and to verify the information submitted by foreign respondents.

Under section 751 of the Act [19 U.S.C. § 1675], the administering authority is required to review and determine at least once during each twelve month period the amount of any antidumping duty (or countervailing duty) and publish notice of the results of the review and the amounts of duty to be assessed. [19 U.S.C. § 1675(a); see also 19 U.S.C. § 1673e].

An obviously crucial lack of manpower has resulted in the ITA's Compliance Division being unable to handle its caseload in a timely manner, particularly where a domestic industry wishes fully to participate. Moreover, there appear to be cases where internal conflicts over policy or other ITA problems have prevented the completion of section 751 reviews for extended periods even after all briefs have been submitted.

For example, on tapered roller bearings from Japan, the ITA divided its first section 751 review into three parts: one covering one Japanese producer; one covering two producers and 38 other exporters or transshippers; and one covering two other major Japanese producers. While the ITA has completed the review of the first part (resulting in the revocation of the order with respect to one Japanese firm)[see, e.g., 46 Fed. Reg. 14371 (2/27/81); 47 Fed. Reg. 25757 (6/15/82); appealed sub nom. The Timken Company v. United States, Court No. 82-6-00890], notice of the preliminary results only have been published with respect to the second part [46 Fed. Reg. 43864 (9/1/81)] and that notice was published eighteen months ago (moreover, all briefs have been before the agency for more than one year); and there has not yet been even a preliminary determination with respect to the third part of the first review despite approximately three years having passed from the date the agency first gave notice of its intention to conduct administrative reviews of all outstanding dumping findings [45 Fed. Reg. 20511 (3/28/80)]. There have been no notices concerning the second or third section 751 reviews as yet.

Carlisle Tire and Rubber Company, PPG Industries and SCM Corporation have all faced similar long delays in the completion of annual reviews of the antidumping or countervailing duty orders of concern to them.

> (b) The ITA permits foreign respondents to abuse the procedures for protecting the confidentiality of business sensitive information and the verification process, thus denying or severely limiting domestic industry participation in the initial investigation or section 751 review.

Section 777 of the Act [19 U.S.C. § 1677f] controls access to information whether "public" or "confidential". As stated in the House Report,

> Section 777 seeks to provide the maximum availability of information to interested parties consistent with the need to provide adequate protection for information accorded confidential treatment. Domestic industry has long contended that its ability to obtain relief under the antidumping and countervailing duty laws has been impaired by its lack of access to the information presented by the exporters and foreign manufacturers. Access to information at the administrative level is even more imperative under the bill, which amends the standards for judicial review of most administrative actions . . . to substantial evidence on the record. [H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); accord, S. Rep. No. 249, 96th Cong., 1st Sess. 100 (1979)]

Sections 751 and 777 are complementary in their intent of giving domestic producers a meaningful role in the administrative review process. Access to information that has been submitted by the foreign parties is absolutely critical to the ability of the domestic industry to participate in the administrative review process, to point out areas of obvious or suspected factual error and to permit identification of factual and legal issues for further investigation by the agency or for development in pre- and posthearing briefs. The agency's regulations permit the foreign producer and/or related importer to submit a nonconfidential summary or to submit only a brief description of the types of information submitted with agreement to release the confidential information under administrative protective order. [19 C.F.R. § 353.28(a)] The agency has recognized the need of domestic industries' counsel to have access under administrative protective order to the confidential submission even where a nonconfidential summary has been provided. [E.g., Arbed, S.A. v. United States, 3 CIT ___, Slip Op. 82-79 (September 22, 1982)] As special counsel for domestic producers, our firm is in complete agreement that counsel need access to the confidential information in addition to the public summary adequately to participate in the administrative proceeding. However, a meaningful nonconfidential summary is absolutely essential if knowledgable employees of the domestic companies participating in the proceeding are to have the opportunity to apply their expert knowledge and judgment to an evaluation, especially, of U.S. market facts, production characteristics, and cost accounting issues which may be relevant to the issues required for determination by the ITA, as, for example, whether merchandise of a certain description sold in the home market is identical or most similar to a particular product sold for export to the United States.

Certain foreign respondents have filed essentially no public summary (or a very inadequate summary), and have agreed to grant access to the submitted information only under administrative protective order, taking advantage of subsection (a)(3) of section 353.28 of the agency's regulations [19 C.F.R. § 353.28(a)(3)]. This situation arises not only in section 751 reviews but also during the initial investigation under section 702 or 732 of the Act. The result is the virtually complete elimination of the domestic industry's knowledgable personnel from involvement in the case and the inability of counsel to engage market research firms for limited verification purposes of key factual areas identified from such a nonconfidential document. Domestic industries are thus confronted with a serious handicap and are faced with the likelihood of considerably higher expenses meaningfully to participate in the proceeding. For example, counsel have to devote a considerable amount of additional effort to become thoroughly versed in the marketing, production characteristics, and cost accounting aspects of the line of commerce affected in order to identify many factual problems that could have been identified by the domestic producers' knowledgeable employees upon review of a meaningful nonconfidential public version of the foreign producers' questionnaire responses. Similarly, since all information is treated as "confidential," it is difficult for the domestic industry to proceed with investigating (e.g., through market research) particular factual issues as to which information submitted by foreign respondents under cloak of confidential treatment appears to be incorrect. The agency places a heavy burden of proof upon domestic producers challenging the accuracy of information submitted by foreign respondents, yet the agencies' administration of the provisions regarding confidentiality effectively frustrate the ability of domestic producers to meet their standard of proof, thus putting domestic producers in a catch-22 situation.

Equally as disenfranchising of their entitlement to participate effectively in antidumping and countervailing duty investigations and reviews, is the practice tolerated by the ITA wherein foreign producers are allowed to withhold information requested in the agency's investigative questionnaire, but to submit the required information to the agency during verification. The ITA's present practice is not to permit access even under administrative protective order to materials obtained from the foreign producer during verification. Thus, by withholding information requested for submission at the questionnaire response stage (where domestic producers are entitled to meaningful nonconfidential disclosure, or confidential disclosure under protective order) and submitting the information instead to the verifying officers of the agency during the postquestionnaire response verification, the foreign producer is enabled by the agency's practice effectively to handcuff the domestic producers and their counsel from effective participation in the investigation or review. As a result, important information belatedly supplied by foreign respondents to the agency, in support of claims for adjustments or price comparisons whose purpose and effect is to explain away margins of dumping or of government subsidization go into the record unrefuted by the domestic producers.

(c) The ITA handicaps its own investigation and unreasonably burdens domestic producer parties by refusing to consider responsibly performed foreign market research reports, affidavits or publicly available information as a basis for further investigation of claims made by foreign respondents.

In participating in either 751 reviews or initial investigations, domestic producers attempt to provide either through their own foreign sales organizations, through market research studies or through publicly available sources (e.g., wholesale price data, annual reports), whatever factual information is available to them pertinent to the issues raised by the foreign respondents' questionnaire responses and other submissions to the agency. Domestic producers have the right to address these issues, and the Congress intended that their contributions to the record should consist of the information reasonably available to them, given the nature of the issue, and the circumstances of the domestic producers. [See sections 702(b)(1), 732(b)(1), 776(a) and (b) of the Act]. The Congressional purpose is clear: to make all pertinent information available to the agency so as to enhance its ability to make factually correct determinations by providing for direct involvement of domestic producers in the investigation through maximum access to information received by the agency with a full and meaningful opportunity to analyze data submitted by the foreign producers for completeness, accuracy and propriety of certain claims. Often a domestic producer will present an affidavit or market research report tailored to challenge specific issues resulting from an analysis of the preliminary determination in light of the public versions of the questionnaire responses. The ITA's practice is to ignore such submissions. It bases that practice upon a view of the legislation which we think is at sharp variance from the Congressional intent. The ITA places a very heavy burden of proof on domestic producers by requiring them to submit specific documentation from the records of their foreign competitors before the ITA will consider the domestic producers' information as worthy of investigation on the issues before the agency. Market research reports based upon interviewing purchasers of the subject merchandise in the foreign markets and which use government and industry reports and other secondary sources, or affidavits of knowledgeable marketing personnel are seldom found by the agency to be sufficient to warrant further investigating any factual disputes.

For example, in light of adjustments being made for differences in merchandise, The Timken Company in the 751 review on tapered roller bearings and certain components thereof from Japan (first part), submitted an affidavit from their market research director in the posthearing brief challenging the propriety of such an adjustment in light of information available to Timken suggesting that the foreign producer sold great quantities of "inch" size bearings in both the home market and for export to the United States, thus suggesting that for the bulk of sales identical merchandise should have been compared. [E.g., Posthearing Brief on Behalf of the Timken Company, Exhibit 3 (filed July 24, 1981)] As the ITA had conducted a verification prior to the issue specifically being raised by Timken, the ITA chose not to further investigate what clearly was a factual dispute raised in the case by the affidavit and accompanying exhibits (including the foreign producer's catalog listing the specific parts alleged to be sold in the home market). 47 Fed. Reg. 25758.

Again, in the case of Natural Menthol from the People's Republic of China (a case not involving any of the domestic producers on whose behalf our firm appears today), the domestic industry submitted the affidavit of the president of a menthol/peppermint oil producer in Paraguay that was used for purposes of establishing a surrogate foreign market value. The president of the company attested to the fact that his company was unable to sell menthol oil for export to the United States at prices above the cost of production. [Prehearing Brief on Behalf of Petitioner, Attachment 2 (filed February 6, 1981)] This information was never contradicted during the course of the investigation. The ITA was presented with this information before the verification trip to Paraguay was completed and when the ITA had ample opportunity to check the validity of the affidavit from the affiant in Paraguay. The ITA never once raised the question of sales below full cost of production during its investigation of the Paraguayan producer. Rather, the ITA raised a series of questions challenging the sufficiency of the data submitted by the petitioner in the affidavits [46 Fed. Reg. 24615 (May 1, 1981)], while totally ignoring the uncontroverted affidavit of the one Paraguayan producer who provided information to the ITA that he had lost money consistently in the last few years on the exportation of menthol.

Similarly, SCM and other domestic producers have submitted extensive market research information in various 751 reviews in an effort to demonstrate that there were factual disputes with the data submitted by the foreign producers, only to find themselves confronted with extensive requests for supporting documentation and/or work product of the market research organization that either are unreasonable on their face (absent a requirement that the market research organization engage in some form of industrial espionage) or impracticable from the standpoint of what foreign market research organizations are willing to release or what in fact is maintained by way of records.

The result of the heavy burden placed on domestic industries wishing to have factual issues thoroughly investigated by the ITA is to reduce the ability of domestic producers to participate meaningfully in the proceeding.

(d) The ITA unreasonably delays disclosure of information to domestic parties in its annual review of antidumping duty orders: the present timing of events in a section 751 review results either in an unnecessarily extended review process or in unnecessary effort being expended by the domestic industry meaningfully to participate.

Domestic producers desirous of actively participating in a section 751 review are faced with an unnecessarily expensive or unnecessarily time consuming procedure at present. The first substantive communication from the ITA to the domestic producers' counsel is late in the section 751 review process, at the time of the signing of the preliminary determination. By that time, questionnaires have been on file for some period of time, and there may or may not have been verification (although if verification has occurred, it is unlikely that public versions of the same will have been made available significantly in advance of the preliminary determinations). Domestic producers must choose between expending considerable energy and time reviewing and critiquing the questionnaire responses and obtaining market research in anticipation of likely preliminary findings of the agency, or awaiting the preliminary determination and then belatedly focusing on those preliminary findings that appear to be clearly erroneous, not supported by the limited information of record that is guardedly available to the domestic producer, or otherwise contrary to law.

If the latter approach is followed, the first significant submission by the domestic producer is likely to be the prehearing brief following the issuance of the preliminary determination and a request for disclosure and a hearing. [See also 19 C.F.R. §353.53(c), (d)] If there are major errors discovered or factual disputes that the ITA agrees to investigate further or that require further briefing (an infrequent occurrence), necessarily the final determination will be extended considerably. [See, e.g., Bicycle Tires and Tubes from Korea, 46 Fed. Reg. 13531 (2/23/81)(preliminary determination); 47 Fed. Reg. 28727 (7/1/82)(final determination); Tapered Roller Bearings and Certain Components Thereof from Japan, 46 Fed. Reg. 14371 (2/27/81)(preliminary determination); 47 Fed. Reg. 25757 (6/15/82)(final determination); Steel Wire Strand for Prestressed Concrete from Japan, 47 Fed. Reg. 21909 (5/20/82)(preliminary determination; no final determination yet announced)].

The ITA has requested that domestic producers provide market research reports and whatever other factual data that they intend to supply during a section 751 review prior to the preliminary determination and as early as possible during the proceeding. [But see 19 C.F.R. §

353.53(c), (d)] While the perception of the ITA that it needs information earlier in a proceeding to permit more timely completions of section 751 reviews is understandable, without modification of ITA practice the result is an increased burden on domestic producers who must cover every waterfront before receiving any guidance from the ITA as to likely results or claims to be rejected/accepted.

> (e) The ITA has refused to review foreign respondent undertakings not to sell at less than fair value in connection with prior antidumping duty order discontinuances and has refused to permit the domestic industry to have access to information from master list proceedings that may constitute the basis for estimated duties or for revocation proceedings.

When foreign producers or U.S. importers refuse to cooperate with the ITA in a timely manner, the ITA has resorted to using the highest current rate found or the most adverse rate previously found in a section 751 review or a master list issued by the Treasury Department under the Antidumping Act, 1921 (if that is the last time period for which information was submitted). [E.g., Bicycle Speedometers from Japan, 47 Fed. Reg. 28978 at 28979-80 (7/2/82); Clear Sheet Glass from Italy, 46 Fed. Reg. 56227 (11/16/81)] Master list information has also been used by the ITA for purposes of making tentative determinations to revoke. [E.g., Tempered Sheet Glass from Japan, 46 Fed. Reg. 28691 at 28693 (5/28/81); Tapered Roller Bearings and Certain Components Thereof from Japan, 46 Fed. Reg. 14371 at 14372 (2/27/81)] Where master list information has been used by the ITA in an investigation, the domestic industry has been denied access to any of the information considered by the administering authority in compiling the master list information, thus effectively eliminating or seriously handicapping the domestic industry's ability to participate in a section 751 review. [E.g., Impression Fabric of Man-Made Fiber from Japan, 47 Fed. Reg. 17319 at 17320 (4/22/82)]

Similarly, the ITA has to date failed to use section 751 to review discontinuances given to particular foreign producers under the Antidumping Act, 1921, despite the agency's own regulations which require such review, viz., 19 C.F.R. § 353.53(e). [E.g., Steel Wire Strand for Prestressed Concrete from Japan (Section 751 Review Proceeding, Prehearing Brief Submitted on Behalf of the Domestic Prestressed Concrete Strand Group), dated June 14, 1982, at 2-13; 47 Fed. Reg. 21909 (no final determination yet); Impression Fabric of Man-Made Fiber from Japan, 47 Fed. Reg. 17319 at 17320 (4/22/82)]

The result of these actions has been that domestic industries have been denied the opportunity to participate meaningfully in the administrative review process or to create a record that would permit meaningful judicial review.

> (f) The ITA should reserve the consideration of issues arising after publication of antidumping duty orders to the annual reviews of the order: where questions have arisen with respect to the scope of outstanding antidumping duty orders, the ITA has often permitted piecemeal investigations instead of requiring all such issues to be raised in the context of a section 751 review.

The ITA in the few years that it has been responsible for the administration of the antidumping and countervailing duty laws has been confronted with a variety of scope-of-prior-investigation questions. Our firm and our clients strongly applaud the ITA's practice to date of notifying the domestic producers (through their counsel) when a scope issue has been raised by an importer or foreign producer and permitting the domestic producers to present argument as to the inclusion or exclusion of merchandise from the scope of the underlying investigation and resulting antidumping or countervailing duty order. PPG Industries, SCM Corporation and The Timken Company have all been confronted with presenting views on the propriety of including or excluding certain merchandise from the scope of the continuing unfair trade proceedings and have vigorously pursued their rights to present views.

The ITA is still groping for a policy for when to handle such scope questions. At least at the beginning, the administering authority has been inclined to consider the issues on a seriatim basis as they arose. For an industry undergoing design and componentry revolutions (such as portable electric typewriters), the frequency of requests for exclusion from the outstanding orders can increase significantly the time and expense spent by the domestic industry ensuring that the law is being properly administered, unless such requests are held in abeyance until the next section 751 review. For example, SCM has been confronted with multiple occasions in the past several years when it has not only had to participate in bifurcated 751 reviews but also has had to separately address claims by foreign producers that various new models were not covered by the reach of the antidumping order on portable electric typewriters from Japan.

(g) The ITA excludes domestic parties from the verification process: the agency has often not provided the domestic industry with a meaningful opportunity to provide input into planned verification trips so as to permit thorough investigation of the issues of concern to the industry.

The ITA has interpreted section 776 of the Act [19 U.S.C. § 1677e] as not requiring verification during a section 751 review. Verification is conducted only where the ITA feels that there is a significant question of fact presented by the questionnaire response or where verification has not occurred in a number of years.

To domestic producers, the opportunity for the agency to engage in a thorough and meaningful verification is deemed essential to the accomplishment of the statutory plan--viz., the administration of the unfair trade laws to prevent such practices from continuing. Moreover, based on our firm's experience, once the ITA has "verified" the respondent's questionnaire responses, it is virtually impossible to get the agency to reconsider certain factual issues deemed by the case handler to have been "verified".

Thus, having some role in the verification process is viewed as extremely important, if not critical, to effective participation by domestic producers and their counsel. While our firm strongly supports the efforts generally made by the ITA, both during the initial investigatory stage and during the 751 reviews, to provide some opportunity for domestic parties to present areas of general concern for consideration by the agency for use during verification, it has been our experience that the timing of the verification trips often reduce the likely actual effectiveness of domestic industry suggestions or which needlessly increase the effort required by domestic participants to provide input.

For example, based on manpower availability, budget constraints, and case workload, the ITA can and does move the timing of whatever verification will take place around considerably. When verification occurs prior to the issuance of the preliminary determination, domestic producers may or may not have even received the public version of the questionnaire response. It is virtually certain that the domestic producers' counsel will not have received the confidential version of the response under administrative protective order. Thus, there may only be time for a quick review of the public version of the questionnaire by the domestic producers and their counsel with little or no opportunity to address the preliminary concerns of the agency and with no opportunity to obtain market research information on particular points of concern prior to the verifying party's departure.

(h) The ITA reduces dumping margins by allowances unsupported by substantial evidence.

Under section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)] and the administering authority's implementing regulations [19 C.F.R. §§ 353.13-.16], the burden of proof for the party seeking an adjustment for differences in circumstances of sale or differences in merchandise is upon the party seeking the adjustment. However, during section 751 reviews it is not uncommon for foreign producers to return questionnaire responses with little, if any, supporting documentation revealing the entitlement of the foreign producer to the adjustment in question. Such practices are particularly troubling where the adjustment sought is dependent upon a finding of fact that properly should be made only by the ITA.

For example, "Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser." [19 C.F.R. § 353.15(b)] Obviously, whether an advertising program was attributable to a later sale of the merchandise by a purchaser is a question of fact not dependent solely upon the existence of advertising, but also requiring a consideration, inter alia, of the media used (i.e., likely audience) and the content of the ad (single product vs. multiple product vs. institutional advertising). To the extent that the administering authority does not reject adjustments based on such submissions out of hand, the result is the expenditure of considerable time and effort by the domestic producers to attempt to determine the legitimacy of the claimed adjustment. [E.g., Tapered Roller Bearings and Certain Components Thereof from Japan, 46 Fed. Reg. 14371 (2/27/81); Bicycle Tires and Tubes from Taiwan, 47 Fed. Reg. 54996 (12/7/82)]

Proposals for Change

1. Appropriations. While a number of the following recommendations provide a basis for more efficient handling of section 751 reviews, the necessary answer to alleviating lack of adequate manpower is increased appropriations for the Investigative and Compliance Divisions

of the ITA. As stated in the House Report of the Committee on Ways and Means in 1979:

> The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past, including the lack of resources devoted to this important area of law. The provisions of this bill are intended to remedy this situation. However, the Committee recognizes that the intended purpose of these provisions can be achieved only if the Executive branch allocates, and necessarily the Congress approves, sufficient resources to ensure vigorous administration. It is the committee's understanding that the Executive branch will request appropriations for the purpose of making substantial increases in personnel assigned to the administration of the antidumping and countervailing duty laws. The Committee cannot emphasize too strongly the need for adequate resources and its expectation that they will be provided. [H.R. Rep. No. 317, 96th Cong., 1st Sess. 48-49 (1979)(Emphasis added).]

This administration has similarly pledged vigorously to enforce our trade laws. [See, e.g., Testimony of Lionel H. Olmer, Under Secretary for International Trade, Before the Senate Finance Committee, September 29, 1982, ". . . combined with vigorous enforcement of our trade laws, to which we have been committed for the past 20 months"; Testimony of Ambassador David R. Macdonald (Trade Representative's Office) at the same hearing, "Thus, vigorous enforcement of our fair trade laws must be viewed as an essential element in our overall economic recovery strategy. It is central to our effort to get the whole of our economic house in order"; Statement of Ambassador William E. Brock, U.S. Trade Representative, Joint Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance and the Subcommittee on International

Finance and Monetary Policy of the Senate Banking, Housing and Urban Affairs Committee, July 8, 1981, (President's economic recovery program has five central policy components, one of which is the "effective enforcement of U.S. trade laws and international trade agreements" (page 9)).]

It is our opinion that the Investigation and Compliance Divisions are desperately understaffed at the present time, (a) necessitating long delays in the resolution of section 751 reviews, (b) prompting the agency to combine existing reviews, (c) resulting in the agency apparently often pushing aside or delaying tackling cases of real concern to the domestic producers because of the effort that will be required to complete the review, (d) encouraging the agency to minimize its verification efforts, and (e) fostering an apparent attitude of abandoning reviews of discontinuances despite a clear regulation requiring them to do so. If adequate budget allocations cannot be provided for the Compliance Division and the Investigations Division) of the ITA, then this administration and the Congress should not hold out the hope to domestic producers that our laws will be enforced in a manner that will eliminate unfair trade practices. As our clients believe that the Congress and the administration intend to fulfill their commitments to American industry and labor, we recommend first that the Congress carefully review the requested appropriations needed by the ITA to carry out the legislative intent and this administration's commitment.

2. Modification of procedure for handling review. We recommend that either by statutory amendment to section 751 or preferably by change in administrative practice or regulation [19 C.F.R. §§ 353.53(c), (d), 355.41(c), (d)], the procedure for conducting a section 751 review be divided into six parts:

(1) receipt of confidential and public versions of questionnaire responses from foreign producers, exporters and related U.S. importers accompanied by all supporting documentation (estimated to be about two months after receipt of questionnaire from the ITA);

(2) initial computations by ITA case handler and identification of adjustments likely to be permitted (if an antidumping proceeding) or the subsidy programs likely to be held countervailable if a countervailing duty review), review of these tentative case handler results with all interested parties, and release of confidential version of questionnaire response under administrative protective order (depending on case and allocation of adequate manpower can be accomplished in four-six weeks);

(3) review of questionnaire responses and initial computations and adjustments by the domestic interested parties (and foreign producers), submissions of market research data, affidavits and other evidence raising factual issues, and identification of factual questions that the domestic producers feel need further investigation and verification (as well as any suggested avenues for developing the facts in question)(twelve to fourteen weeks);

(4) preparation of preliminary determination on the basis of information obtained from (1)-(3), verification, reports on verification trip made available, release of confidential versions of the verification reports with accompanying exhibits (two months, if adequate manpower is provided);

(5) preparation of prehearing briefs, submission of market research reports, affidavits or other evidence to challenge verification reports or their attachments, hearing, posthearing brief (two months);

(6) preparation and release of final determination (one month).

Such a procedure, if adopted, would permit (a) the domestic interested parties that were concerned by unfair import competition to participate in a meaningful manner at each stage of the investigation, providing factual information (where it chose to do so) in a manner and on a timetable that would permit efficient use of the same by the ITA, while minimizing the cost and expense to the domestic producer desirous of actively participating, and (b) the ITA to perform its function of investigating and verifying controverted factual information in an efficient manner, within the statutory timeframe, without the need for double-tracking and with the benefit of domestic parties' input as to factual concerns presented by the questionnaire responses.

If a domestic industry were satisfied with the tentative direction of the ITA or with the preliminary determination of the agency, it obviously need not participate in that particular review. There have been many instances where domestic industries have chosen just that option in the past. [E.g., Clear Sheet Glass from Italy, 47 Fed. Reg. 44595 (10/8/82)] But where a domestic interested party is concerned by the ITA's apparent direction or is concerned because of the continuing problems with unfairly traded import competition, the proposed revised schedule would permit meaningful participation at a minimum of cost and with a guarantee of timely action.

3. Modification of Section 777(b) and (c) of the Act. Subsections (b)(1) and (c) of section 777 of the Act [19 U.S.C. § 1677f] should be modified to read as follows:

> (b) Confidential Information.--
>
> (1) Confidentiality Maintained.--Except as provided in subsection (a)(4)(A) and subsection (c), information submitted to the administering authority or the Commission which is designated as confidential by the person submitting it shall not be disclosed to any person (other than an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted) without the consent of the person submitting it. The administering authority shall require that information for which confidential treatment is requested be accompanied by a nonconfidential summary in sufficient detail to permit meaningful participation by domestic parties to the proceeding. The Commission shall require that all briefs and correspondence filed in connection with a conference or a final investigation hearing be accompanied by a nonconfidential summary in sufficient detail to permit meaningful participation by all other parties to the proceeding.

* * *

(c) Limited Disclosure of Certain Confidential Information Under Protective Order.--

(1) Disclosure by Administering Authority. Upon request by counsel for an interested party, the administering authority shall release under administrative protective order, unless such information is withdrawn from consideration by the submitter: (a) to counsel for domestic interested parties, all confidential information submitted to the administering authority by the foreign producers, exporters, transshippers or U.S. related importers, including all information obtained during verification or used for preparing a master list and including all information submitted in the form of a computer tape or printout, except customer names of U.S. purchasers (for which a description of the category of purchaser, including industry and level of trade will suffice); to counsel for foreign producers, exporters, transshippers or related U.S. importers, all confidential information submitted by domestic interested parties except the identity of market research organizations (where confidential treatment has been requested) used and of sources.

(2) Disclosure by Commission. Upon request by counsel for an interested party, the Commission shall release under administrative protective order, unless such information is withdrawn from consideration by the submitter, (a) to counsel for domestic interested parties, all confidential information pertaining to prices submitted to the Commission by U.S. importers, except customer names of U.S. purchasers (for which a designation of the geographical area of the country and the category of purchaser, including industry and level of trade will suffice); (b) to counsel for foreign producers, exporters, transshippers or importers, all confidential information pertaining to prices submitted to the Commission by U.S. domestic producers, except customer names of U.S. purchasers (for which a designation of the geographical area of the country and the category of purchaser, including industry and level of trade will suffice).

> (3) Disclosure to Consultants. The administering authority and the Commission shall permit access to the confidential information to qualified experts (including computer houses) upon the request of and an undertaking by counsel for a qualified interested party to guarantee compliance with the terms of a suitable protective order by the designated expert and a showing by the designated expert that said expert can and will safeguard the confidential information in question, will be supervised by the counsel of the party concerned, and can be made subject to sanction in the case of breach of the protective order. Failure by the counsel requesting release to such expert to establish procedures concerning the use of the confidential information and to supervise use of the confidential information by the expert, may be deemed breach of the order by the counsel if the expert violates the terms of said order.

The proposed amendment to section 777 of the Act -

(1) will eliminate a great deal of paperwork and expense for all parties concerned as well as the administering authority,

(2) will recognize by statute what the ITA has recognized with respect to confidential information submitted by foreign producers and what the ITC has recognized with respect to pricing information submitted by domestic producers, *viz*., that counsel have a compelling need for such information to participate fully in the administrative proceeding [*see*, *e.g.*, *Arbed, S.A.* v. *United States*, 3 CIT ___, Slip Op. 82-79 (September 22, 1982); *American Spring Wire Corporation* v. *United States*, 3 CIT ___, Slip Op. 82-102 (November 16, 1982)],

(3) specifically includes within the discoverable material all information included as part of the verification report and submitted on computer tapes hence eliminating problems that domestic producers have experienced in the past,

(4) provides equality of treatment at each agency to both domestic and foreign parties, thus ending the present discriminatory practice against domestic interested parties at the International Trade Commission sanctioned by section 777(c)(2)[_see_ _American Spring Wire Corporation_ v. _United States_, _supra_],

(5) delimits the confidential information which will _not_ be disclosed under protective order (information for which foreign parties or domestic producers have been the most sensitive),

(6) permits release to outside consultants where certain conditions are met, and

(7) requires foreign producers, exporters, transshippers and U.S. related importers to supply a meaningful nonconfidential summary of their submissions to permit active involvement by the domestic producers.

The proposed change does not eliminate the need for counsel to sign a protective order form or to be subject to sanctions in the case of breach of the protective order. The dramatic simplification and certainty of application of the law will permit all parties to focus on the factual and legal issues at hand without expending great energy and time attempting to limit the participation of the other side in the investigation.

4. _Modification of Section 776 of the Act_. We recommend that section 776's title be modified and that a new subsection (c) be added, to read as follows:

> Sec. 776. Verification of Information; Resolution of Factual Disputes.
>
> * * *
>
> (c) Resolution of Factual Disputes.--Whenever an interested party presents to the administering authority in a timely manner a market research report (which report is to be accompanied by a description of methodology and an identification of sources), an affidavit with supporting documentation, public source documents or references, or other documents of comparable reliability which call into question factual assertions included in questionnaire responses, verification reports, or other information submitted by foreign respondents, the administering authority shall promptly investigate the factual dispute and include a discussion of the resolution of the dispute in the final determination (either under section 705, 735, 736, or 751 of the Act) published in the Federal Register and shall notify the interested parties as soon as possible after resolution.

The proposed change to section 776 of the Act will shift the burden of investigating factual disputes back to the administering authority and should prevent the ITA from placing requests on the domestic industry for back-up information that is not realistically within the control of the domestic industry.

5. Modification to the Verification Process to Permit Domestic Industry Participation. Because of the crucial role of verification in many of the section 751 review proceedings and in all initial investigations, the ITA's handling of factual disputes that arise after verification, and the Court's deference to factual information "verified" by the administering authority, domestic producers are seriously concerned about assuring the completeness and thoroughness of the verification exercises and troubled by the essential exclusion of domestic interested

parties from the actual verification process. Part of the perceived problem has been addressed in recommendation number 2 above. The remainder requires a modification of the statute [19 U.S.C. § 1677e] and the agency's regulations [19 C.F.R. §§ 353.51, 355.39] or practice. We have three proposals, presented below in descending order of preference, although the proposals are not mutually exclusive:

(1) permit domestic counsel to attend verification (covered by an administrative protective order) and suggest lines of questioning or types of documentation to the ITA's investigator;

(2) have a verbatim transcript of the verification process;

(3) permit "neutral" counsel to attend the verification (covered by an administrative protective order) and suggest lines of questioning or types of documentation to the ITA's investigator.

While these proposals would increase the "upfront" costs of the domestic industry or costs to the administering authority, it is our belief that where a domestic interested party is concerned enough about the investigation or the review to authorize counsel to attend the verification (not likely in many or most reviews), the ability of domestic counsel to suggest lines of inquiry during the verification process may clear up considerable areas of controversy or concern on behalf of the domestic interested parties, may result in lower costs in the remainder of the investigation and less resort to the courts to get judicial review of administrative determinations. Procedurally, we believe that this is one of the essential areas where change would appreciably improve the administration of the law.

6. Modification to Section 751(a)(1)(C) of the Act; Adding Subsections (a)(3) and (a)(4). The following proposed changes to section 751 of the Act [19 U.S.C. § 1675] will permit the elimination of a variety of problems previously identified:

> Sec. 751. Administrative Review of Determinations.
>
> (a) Periodic Review of Amount of Duty.
>
> (1) In General.--At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this title or under section 303 of this Act, an antidumping duty order under this title or a finding under the Antidumping Act, 1921, or a notice of the suspension or discontinuance of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall--
>
> * * *
>
> (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended or discontinued, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,
>
> and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.
>
> * * *
>
> (3) Burden of Proof. All factual assertions as to permissible adjustments under section 773(a)(4) or section 771(6) of the Act to be considered by the administering authority must be supported at the time of assertion with supporting documentation substantiating entitlement to such adjustments.
>
> (4) Scope of Underlying Investigations. Questions concerning the scope of an outstanding countervailing duty or antidumping order or finding will be investigated solely during the context of an administrative

> review of determinations under this section. Upon being notified of a question concerning whether certain merchandise is included within an outstanding order, the administering authority will make a preliminary decision as to the likelihood of inclusion. All merchandise determined likely to be included will be subject to suspension of liquidation pending resolution of the issue at the conclusion of the administrative review. Merchandise determined likely not to be included within the scope of the underlying investigations will not be subject to suspension of liquidation absent specific request by a domestic interested party and the posting of a bond with the administering authority by said domestic party in an amount determined by the authority.

These amendments require the ITA to review discontinuances under the Antidumping Act, 1921, as is presently required by their regulations, make certain that foreign producers are not permitted to claim adjustments to foreign market value or to the value of the net subsidy without the timely submission of supporting documentation demonstrating the entitlement to the same, and funnel all challenges to inclusion of merchandise within the scope of an order into a section 751 review. The adoption of these changes will reduce the time and expense of domestic parties having to challenge claimed adjustments for which no substantiating evidence has been submitted, will reduce the likelihood that domestic producers will challenge adjustments where such adjustments are warranted by the facts of record, will eliminate the need of domestic interested parties having to litigate the proper scope of an order (and its underlying determinations) on a piecemeal basis, and will assure that our nation's unfair trade laws are administered in a manner that will eliminate such practices.

Issue # 2. Other substantive and procedural problems flowing from the administration and interpretation of the antidumping duty law by the administering authority.

No single trade law is of greater immediate concern to the clients on whose behalf our firm appears today than the antidumping law. For example, there is an antidumping duty order outstanding against portable electric typewriters from Japan. SCM appeared before this Subcommittee almost sixteen months ago to review by testimony and by prepared statements the adverse consequences to SCM's typewriter business and its employees of the interpretations of the antidumping law being followed by the administering authority that did not eliminate price discrimination but merely explained away dramatic price discrimination obviously practiced by the major Japanese producers. [See U.S. Trade Policy, Phase II: Private Sector: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, Part A, 97th Cong., 1st Sess. at 641-704 (Serial 97-46)(1981)] None of the agency's interpretations have changed to date, and SCM continues to suffer from unfairly traded imports as its recent layoff of an additional 300 typewriter employees on March 7th of this year attest.

There is an outstanding antidumping order concerning tapered roller bearings and components thereof from Japan. The Timken Company has sought for a full decade to obtain the relief intended by Congress, with but little success. SCM and Timken have each had opportunities to review with the policy makers of the administering authority, not in the context of specific reviews but rather from the standpoint of policy formulation by the agency, their perception that the discretion of the agency is being exercised in a manner not intended by statute but which favors the interests of foreign producers over those of domestic workers and their employees. In the case of Timken, an extensive list of examples of the exercise of discretion by the ITA against domestic producers' interests was presented to the Assistant Secretary of Commerce for Trade Administration. [Letter to Mr. Lawrence J. Brady from Eugene L. Stewart, Esq., dated November 29, 1982] To date, there has been no change in the manner in which the agency chooses to exercise its discretion, and indeed no response by the Assistant Secretary to the list of policy and practices abuses presented to him.

Roses Inc., which has had the administering authority refuse to commence an antidumping investigation on roses from Colombia, has appeared before this Subcommittee in the last year to testify concerning proposed legislation (H.R. 6239), during which Roses Inc.'s unsuccessful efforts to obtain relief from unfair and fair trade practices were chronicled. [Miscellaneous Tariff and Trade Bills: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 97th Cong., 2d Sess. at 317-42 (Serial 97-58)(1982)]

American Spring Wire Corporation and Florida Wire & Cable Company are domestic prestressed strand producers who have participated in the review of the antidumping order concerning strand from Japan, an antidumping investigation of strand from the United Kingdom, and now a challenge in the Court of International Trade to a negative injury determination by the International Trade Commission.

Similarly, Carlisle Tire & Rubber Company is presently the petitioner in an antidumping duty investigation against bicycle tires and tubes from Taiwan, as petitioner is an interested party participating in the administrative reviews of the antidumping duty order on bicycle tires and tubes from Korea, and has been challenging in the Court of International Trade a prior negative determination of sales at less than fair value by the Treasury Department on bicycle tires and tubes from Taiwan.

Finally, PPG Industries has actively participated as a copetitioner in a number of antidumping duty proceedings against flat glass from European countries, Japan and Taiwan, and is currently a domestic interested party participant in administrative reviews of antidumping orders against flat glass products from Japan and Taiwan.

How the antidumping law is interpreted is thus of considerable day-to-day importance to these and many other domestic producers and their employees.

The views expressed herein are about problems that need to be addressed by the Congress with a sense of urgency. Some problems are fundamental issues of misinterpretation or plain inattention by the administering authority for Congressional intent. These issues involve both the particular unfair trade practices which the Congress was intent upon neutralizing in harmony with our nation's open policy of encouraging fair trade, and the manner in which the true extent of the price discrimination being practiced is hidden or explained away by the agency's administration.

Many of the legal issues pertaining to the administering authority's misreading of Congressional intent relating to these foreign producer and exporter price discrimination strategems and practices are before the Court of International Trade or the Court of Appeals for the Federal Circuit for judicial review. Our purpose in discussing these issues here is not to anticipate or ask the Congress to thwart the jurisdiction of the courts to deal with these issues of policies and practices of the ITA which contradict the statute and Congressional intent, but rather to suggest modifications to the ITA's policies and practices through clarification of Congressional intent by explicit amendment of the statute that will provide expeditiously for the improvements and reforms of the ITA's administration of the Act which are required to make available the complete and prompt neutralization of injurious price discrimination by foreign producers and exporters which it has been the unswerving intention of the Congress to achieve through more effective administration of the antidumping statute.

Major issues that need urgently to be addressed include the following:

(a) the so-called "exporter's sales price offset" in related party transactions [19 C.F.R. § 353.15(c)];

(b) the failure by the ITA to give effect to the specific requirement of the statute and its own regulations that as a pre-condition to adjustments to home market prices for differences in quantities, differences in circumstances of sale, or differences in merchandise it be established to the satisfaction of the administering authority that the price discrimination being investigated is due in whole or in part to such claimed differences, and that the amount of any adjustment be limited to the thus-established effect on the prices being compared (this is the so-called "causal link" issue) [Sec. 773(a)(4) of the Act, 19 CFR 353.155 (a)];

(c) the ITA's assumption that differences in costs necessarily result measure for measure in differences in the prices being compared in determining the fact and amount of price discrimination [19 C.F.R. § 353.15(d)];

(d) the inclusion of profit generated by a related U.S. importer in exporter's sales price (this is an issue of legislative lapse in which the formula specified by the Congress to determine the equivalent arm's length value for merchandise supplied by a foreign producer to a U.S. importer affiliate fails to specify that the profit added by the importer be deducted from its resale price, though its direct and indirect costs are so specified) [19 U.S.C. § 1677a(e)];

(e) making adjustments to the foreign market value for differences in circumstances of sale when United States price is based on exporter's sales price.

(f) use of weighted average home market prices in determining foreign market value [19 U.S.C. § 1677b(f)];

(g) consequences of section 772(d)(1)(C) of the Act [19 U.S.C. § 1677a(d)(1)(C)];

(h) investigations concerning state-controlled economies [19 U.S.C. § 1677b(c)].

(i) exparte communication between the ITA and foreign embassies following the filing of antidumping petitions to solicit, receive and consider foreign party submissions seeking to contradict the allegations of the petition, leading to the dismissal by the ITA of antidumping petitions which meet the statutory and Congressional intent standard of containing allegations required by Sec. 731 of the Act with information reasonably available to the petitioner which support such allegations. Resolving such issues is intended by the Congress to be addressed in the antidumping duty investigation, and not by exparte communication by the ITA with foreign embassies and parties during the 20 day period in which the statute and Congress intended that the ITA's review of the petition be limited to determining if the allegations state a case for investigation, and if information is submitted in support of such allegations.

I will now examine each of these problems to the effective administration of the antidumping law in turn.

> (a) The [illegible]y reduces or eliminates dumping margins by impr[illegible]ns in home market prices for general expens[illegible]oreign producer/exporter exports to a U.S. s[illegible]s af[illegible] the so-called "exporter's sales price offset[illegible]

Domestic produce[illegible] extraordinary situation where a foreign competitor sell[illegible]nited States through a related company as opposed to [illegible]ough an unrelated importer. As the Subcommittee's review of trade with Japan will make obvious, a great many foreign competitors in major industries sell through related importers (e.g., cars, steel, TVs/radios/stereos, typewriters, bearings). A review by our firm of prior antidumping investigations and outstanding antidumping duty orders indicates that the majority of all antidumping investigations concern at least some foreign producers who are selling in the United States through related importers. Sometimes such foreign producers also sell directly to unrelated U.S. purchasers. This, for example, is true in the case of at least some of the Japanese producers of portable electric typewriters.

Since the original drafting of the antidumping act in 1919, Congress has been concerned that prices between related parties might not present an accurate reflection of an arms length price and might, accordingly, not reveal the price discrimination actually being practiced. Exporter's sales price has since the beginning been designed to create an estimated arm's length price, comparable to what the price would have been between a foreign producer and unrelated U.S. importer. [See, e.g., 60 Cong. Rec. 328 (1919); General Tariff Revision: Hearings Before the House Comm. on Ways and Means, 67th Cong., 1st Sess., Part IV: Administrative and Miscellaneous, 4234 (1921)(Statement of Merchants' Association of New York); S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921); Emergency Tariff and Antidumping: Hearings on H.R. 2435 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. 42-43 (1921)(colloquy between Senator Porter J. Macumber and Mr. George Davis, Special Agent in Charge, Customs Service, New York, New York)]

Since the Treasury Department amended the antidumping duty regulations in 1976, first Treasury, then the ITA has made an adjustment by way of deduction from the home market price of an amount of indirect selling expenses incurred in the home market. The amount of the adjustment may be equal to but not in excess of the amount of indirect selling expenses which the Congress specified should be deducted from the price at which an importer related to the foreign producer exporter resells the imported merchandise in the United States. The latter adjustment is part of the process of stripping out of resale prices the expenses incident to bringing the merchandise into the United States and reselling it in this market. The purpose of the adjustment [mandated by the Congress in the definition of exporter's sales price] is to arrive at a constructed arm's length price for use as a proxy for purchase price (arm's length selling price by a foreign producer to an unrelated U. S. importer). That constructed arm's length price is called the exporter's sales price.

First the Congress should know that indirect selling expenses are not allowed as adjustments under the provision for adjustments for differences in circumstances of sale, since by express legislative intent and by text of regulation, only expenses directly related to the sales under investigation are permitted. Second, to get around this explicit limitation, the Treasury [echoed by the ITA in copying the Treasury regulations in 1980] introduced the special rule for the ESP offset in the "Differences in circumstances of sale" section of the antidumping duty regulations with the astonishing flat-law disclaimer, "Notwithstanding the criteria for adjustments for differences in circumstances of sale". [Need the Congress be reminded that agencies to whom it has delegated authority to act under specific guidelines and limitations may not lawfully disregard the Congressional mandate by the use of a facile disclaimer such as [to paraphrase the ITA regulation] "Notwithstanding the limitations in the law, we shall act to the contrary"?]

The effect of this unlawful rule determinedly applied with persistence by the ITA and to date upheld by the Court, in the view of the domestic producers we represent at this hearing, is to create a sanctuary for related foreign producers and U.S. importers to pursue a U.S. market penetration strategy based upon price discrimination shielded from any antidumping duty consequences.

The simple example that follows, which compares the results if the same product is sold by a foreign producer to a related and to an unrelated purchaser at the same price and is resold by each purchaser at the same price, demonstrates the problem faced by domestic producers who confront foreign competition with U.S. affiliates or related importers. Essentially, the present agency regulation provides a license to dump to related foreign producers and U.S. importers.

Illustration of How the "Exporter's Sales Price Offset" Affects the Statutory Values For Determination of Whether Sales for Export to the United States are at Less Than Fair Value (i.e. Dumping) and for Assessment of Antidumping Duties as Calculated Under ITA Regulations:

Comparison of Country of Origin Home Market Sales
With Export Sales to U. S. Importers Related to
the Foreign Producer/Exporter; and, Separately With
Export Sales to Unrelated Importers Who Purchase at Arm's Length Prices:

Sale By Foreign Producer/Exporter XYZ Manufacturing Co. of 1,000 Widgets Each to Unrelated Purchaser A in Country of Origin Compared with Sale/Transfer to Related Purchaser B (Subsidiary of XYZ Mfg. Co.) and with Arm's Length Sale to Unrelated Purchaser C in the United States

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
1. Price from factory, country of origin:	$150.00	$112.50	$112.50
2.-inland freight	$5.00	$4.00	$4.00
3.-packing costs	$2.00	$3.00	$3.00
4.-delivered cost to first purchaser [f.o.b. purchaser's plant in country of origin, and f.a.s. foreign port for export], (i.e., lines 1 + 2 + 3):	$157.00	$119.50	$119.50
5.-ocean freight, insurance duty, inland U.S. transp. on transfer to affiliated U.S. sales company (Col. B), and to unrelated U.S. purchaser (Col. C):		$10.00	$10.00
6.-general selling expenses of the U.S. importers in reselling the imported merchandise in the U.S.:		$20.00	$20.00

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
7.-U.S. importer's addition for profit on its resale of the imported merchandise in the U.S.:		$22.50	$22.50
8.-price at which the imported merchandise is resold in the U.S. market by the importer: [prices in a free market, such as the U.S. are, of course, set in response to the interaction of supply and demand, and not merely on the basis of aggregate costs; for the purpose of this illustration, the price at which the importers resell the imported merchandise in the U.S. market is shown as the sum of their costs plus their addition for profit (an amount which itself would reflect the price effects of the supply/demand equation); viz., lines 4 + 5 + 6 + 7]		$172.00	$172.00
9.--general (i.e. indirect) selling expenses of the foreign producer in selling the like merchandise in the country of origin for consumption in the home market:	$22.00		
10.-The "foreign market value" or "fair value" of the merchandise under investigation, for comparison with the arm's length selling price for export (i.e., the "purchase price", Column C) line 1, Column A compared with line 1, Column C:	$150		$112.50

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
11.--Margin of sales at less than fair value [or, the amount of antidumping duties to be assessed pursuant to Sec. 751 review determinations] when foreign market value is compared with purchase price:			$37.50
12. The 'foreign market value' or "fair value" of the same merchandise for comparison with the "exporter's sales price" of the like merchandise sold or transferred to the foreign producer/exporter's U.S. sales affiliate: [line 1 Column A minus that portion of line 9 Column A which does not exceed line 6, Column B, viz., $150 - $20]:	$130	$135	
13.-Margin of sales at less than fair value [or, the amount of antidumping duties to be assessed pursuant to Sec. 751 review determinations] when foreign market value is compared with exporter's sales price:		$0.00	

As the prior example demonstrates, despite a situation where price discrimination is obvious in both sales to the United States, the agency's interpretation of the statute permits dumping margins to be explained away in the situation of the related party purchaser in the United States to the extent of the general selling expense "offset". Thus, while a domestic producer can obtain relief from price discrimination practiced by the foreign producer in selling to an unrelated U.S. purchaser, there is no relief (or dramatically reduced relief) from the same injurious price discrimination practiced by the foreign producer in selling to a related U.S. purchaser.

(b) The ITA improperly reduces dumping margins by assuming and not requiring the proof required by the statute of the causal link between differences in prices and alleged differences in circumstances of sale or merchandise--i.e., by assuming that differences in costs necessarily result measure for measure in differences in the prices being compared in determining the fact and amount of price discrimination.

Section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)] permits adjustments to foreign market value for differences in circumstances of sale and for differences in merchandise "if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or the fact that the United States price is the same as the foreign market value) is wholly or partly due to" such differences. The administering authority's regulations pay lip service to this statutory prerequisite for an allowance for the described categories of differences. [19 CFR 353.15(a); 353.16] A problem has arisen, however, in determining when that statutory and regulatory prerequisite for consideration of an allowance is satisfied. The problem is pervasive, as adjustments under section 773(a)(4) of the Act are requested in virtually every antidumping investigation and every section 751 review of an outstanding dumping finding or order.

While it is indisputable that the antidumping law is a price discrimination statute [e.g., H.R. Rep. No. 317, 96th Cong., 1st Sess. 44 (1979); S. Rep. No. 1298, 93d Cong., 2d Sess. 169 (1974)], the administering authority, through section 353.15(d) of its regulations [19 C.F.R. § 353.15(d)], has created what appears to have been treated by the agency as an irrebutable presumption that if the foreign producer can demonstrate on an ex post facto basis that there is a difference in costs based on the differences in circumstances of sale or differences in merchandise, the producer is entitled to an adjustment. Thus, an adjustment will be permitted even where the evidence of record demonstrates that the same price was charged despite different costs being incurred. For example, warranty costs, actual payment terms, and freight absorption often vary by purchaser even though prices to all customers may be identical. [See also Carbon Steel Plate from Romania, 47 Fed. Reg. 35666-67 (1982)(adjustment for difference in freight cost even though in home market product was sold at identical price from two different basing points)] The agency ignores and does not further investigate evidence that demonstrates that the same product incurring different costs is sold for the same price in the home market (e.g., the same product sold to different customers on a delivered basis, one customer paying in 60 days and the other in 90 days). The result is "an unjustifiable reduction in or elimination of the dumping margin." [H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979)]

Through our firm's long experience in investigating the facts pertinent to antidumping duty proceedings, we are aware that foreign producers and exporters of foreign merchandise on occasion price their goods for sale in the U. S. market by their U. S. sales affiliates/importers strictly as a fixed percent below the U. S. producers' prices--i.e., regardless of what its costs of producing, exporting, and marketing the merchandise in the United States are. The agency in administering the law does not request information from the foreign producer concerning the basis upon which the merchandise is priced to its wholly-owned U.S. sales affiliate, nor the basis upon which its controlled U.S. affiliate is required to resell the imported merchandise in the United States. Instead, the agency skips over the statutory prerequisite to an allowance, ignores subsection (a) of its own difference in circumstance-of-sale regulation, 19 CFR 353.15, and the comparable threshhold-for-allowance criteria in its difference-in-merchandise regulation, 19 CFR 353.16, and in an automatized manner grants an allowance upon the basis of information basically unrelated to the actual setting of selling prices, viz., the claimed difference in costs in selling in the two markets or the claimed difference in producing that aspect of the merchandise claimed to be different.

That pricing decisions are often made without strict regard to the relative costs of the products has been recognized for generations. For example, Jacob Viner, in his treatise, Dumping: A Problem in International Trade [at 23-29 (1923)], provided a variety of illustrations of dumping situations. Each of the examples demonstrate pricing decisions that are divorced from cost considerations. In an article by Stephen W. Davies and Anthony J. McGuiness [Dumping at Less Than Marginal Cost, 12 J. Int'l Economics 169 (1982)], the authors note that there can be motives for dumping not only below full cost (as that term is defined in section 773(b) of the Act [19 U.S.C. § 1677b(b)]) but even below marginal cost.

The irony of administering a price discrimination statute, where the evil to be corrected is a company selling the same product at different prices (i.e., where competitive advantages (costs) are not reflected in the prices charged), on the assumption that foreign producers always reflect differences in costs in their prices, cannot be lost on this Subcommittee. The House Ways and Means Committee stated in the House Report to the Trade Agreements Act that it "reaffirms its intention that these unfair trade statutes be administered in a manner that will prevent such practices." [H.R. Rep. No. 317, 96th Cong., 1st Sess. at 45-46 (1979)(emphasis added)] Presumably, the quoted language refers to the price discrimination in the context of the antidumping law. The agency's present interpretation has exactly the opposite tendency, as nearly any amount of price discrimination can be explained away on a post facto basis. As stated by then Deputy Assistant Secretary of the Treasury James P. Hendrick, "Given sufficient imagination, lawyers and accountants can produce surprising results!" [Hendrick, The United States Antidumping Act, 58 Am J. of Int'l L. 914, 922-23 (1964)]

(c) The ITA reduces dumping margins on imports by U. S. sales affiliates of foreign producers/exporters by failing to deduct from resale prices in the U. S. the profit added by the affiliate in constructing the exporter's sales price proxy for an arm's length price between the related parties.

As mentioned previously, since 1919 the Congress has been concerned with establishing a proxy for arms-length prices between a foreign producer or exporter and a related U.S. importer. The answer in 1921 as today has been the special derived value known as "exporter's sales price" ["ESP"]. In order to approximate an arms length price to the importer, section 772 of the Act directs the ITA to start with the resale price and to deduct out all expenses incurred in reselling the merchandise in the United States. Section 772(e)(1) specifically requires the administering authority to deduct from the ESP any commissions which were earned by the related-party importer for reselling the merchandise in the United States. If, however, the related-party importer does not take a commission from its parent foreign exporter, and instead is permitted to earn a profit on resale in lieu of or in addition to a commission, the Act does not expressly instruct the ITA to remove that profit element from the ESP calculation, and the administering authority does not require that a reasonable profit be deducted from the resale price. [E.g., Tapered Roller Bearings and Certain Components

Thereof from Japan, 47 Fed. Reg. 25757 at 25758 ("[t]here [is] no statutory provision for a deduction from the ESP of a U.S. subsidiary's profit.")]

While there is no statutory mandate specifically requiring such a deduction, the agency certainly has the discretion to interpret the law in a manner to achieve the Congressionally intended result. Moreover, such an interpretation would be consistent (1) with the understanding of the original drafters of the antidumping law in the United States [e.g., Hearing on H.R. 2435 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. 42-43 (1921)(Statement of George Davis, Special Agent in Charge, Customs Service, New York City, New York)(commission or profit would be deducted from resale price)], (2) with the International Antidumping Code of 1967 [19 U.S.T. 4348, reprinted in S.D. Metzger, Law of Int'l Trade: Documents and Reading, Supplement (1966) at 74-85 (Articles 2(e) and 2(f)(allowance should be made "for costs, including duties and taxes, incurred between importation and resale, and for profits accruing")], (3) with the Antidumping Duty Code adopted from the Tokyo Round [Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232, pages 3 and 4 (Articles 2 ¶ 5, ¶ 6 ("allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made"), reprinted in House Doc. No. 96-153, Part I, 96th Cong., 1st Sess. at 313-14 (1979)], and (4) with the EC's interpretation of the Code [e.g., Commission Decision of 4 June 1981, 81/406/EEC, OJ No L 152/44-46 (11.6.81)(ball and tapered roller bearings, originating in Japan, Poland, Romania and the Soviet Union)(use of "reasonable profit margin of 6%")]

The ITA's position causes the United States price based upon ESP to be inflated by an amount equal to the profit taken by the related-party importer or by the amount that should have been earned. Thus, the ITA position overstates the ESP and consequently reduces the margins of dumping. Please notice that in the example which I have provided in the table on page 46 above, the present rule not to deduct the importer's addition for profit on the resale of the imported merchandise in an ESP situation has a major effect of reducing the margin of dumping. It is as pernicious in its effect as the ESP offset. Together, they shield dumping by foreign producers through affiliated sales organizations in the United States from correction. Truly, the rule against deducting profits in determining ESP, and the ESP offset as a reduction in foreign market value, have virtually made it impossible to protect domestic industries from the injurious effects of actual price discrimination practiced by the large manufacturing corporations in Asia and Europe.

(d) The ITA reduces dumping margins in exporter's sales price situations by improperly deducting home market expenses from home market prices.

Section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)] and section 353.15(a) of the regulations [19 C.F.R. § 353.15(a)] permit adjustments to foreign market value for differences in circumstances of sale [and for differences in merchandise] to the extent such differences result in different prices. As stated previously, exporter's sales price is a constructed price meant to approximate an arms length price to an unrelated purchaser (i.e., to be an estimated purchase price). Because the parties are related, the statute does not have the administering authority compare circumstances of sale between the foreign producer and the home market customer, on the one hand, against those between the foreign producer and the U.S. related purchaser on the other. Since there is no comparison, there is no basis for making a determination that there are differences in the circumstances of sale.

However, the ITA in the exercise of discretion and policy-making has determined that when FMV is compared to ESP the entire amount of expenses claimed to be incurred on home market sales should be deducted from FMV. [E.g., Certain Steel Products from the United Kingdom, 47 Fed. Reg. 35670 ("Where we compared exporter's sales price with foreign market value, we treated the credit expenses and warranty expenses as deductions, instead of adjustments for the differences. . . ."); _see also_ Portable Electric Typewriters from Japan, 47 Fed. Reg. 43993] _This "adjustment" or deduction provides an enlarged license to dump to related parties as may be demonstrated by the following example_.

Illustration of How the "Exporter's Sales Price Offset" in Combination With Adjustments for So-Called "Differences in Circumstances of Sale" Affects the Statutory Values For Determination of Whether Sales for Export to the United States are at Less Than Fair Value (i.e. Dumping) and for Assessment of Antidumping Duties as Calculated Under ITA Regulations:

Comparison of Country of Origin Home Market Sales With Export Sales to U. S. Importers Related to the Foreign Producer/Exporter; and, Separately With Export Sales to Unrelated Importers Who Purchase at Arm's Length Prices:

Sale By Foreign Producer/Exporter XYZ Manufacturing Co. of 1,000 Widgets Each to Unrelated Purchaser A in Country of Origin Compared with Sale/Transfer to Related Purchaser B (Subsidiary of XYZ Mfg. Co.) and with Arm's Length Sale to Unrelated Purchaser C in the United States

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
1. Price from factory, country of origin:	$150.00	$112.50	$112.50
2.-inland freight	$5.00	$4.00	$4.00
3.-packing costs	$2.00	$3.00	$3.00
4.-credit costs incurred by foreign producer in selling to Purchaser A in the home market, and in selling/transferring to Purchaser B and C in the export to U.S. market: (90 day terms)	$4.50	$4.50	$4.50
5.-warranty expenses paid by XYZ to A,B and C	$5.00	$5.00	$5.00
6.--general (i.e. indirect) selling expenses of the foreign producer in selling the like merchandise in the country of origin for consumption in the home market, and in selling the merchandise to Purchasers B (including home office supervision of U.S. affiliate, training of U.S. personnel, expenses incurred on behalf of U.S. affiliate paid for by parent (e.g. national image advertising program)) and C in the export-to-U.S. market:	$22.00	15.00	15.00

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
6a.--financing of U.S. affiliate (below interest loans, payment of salaries of certain personnel, provision of extended terms for other products not subject to dumping proceeding) not normally investigated by ITA.:		$7.00	
7.-delivered cost to first purchaser [f.o.b. Purchaser A's plant in country of origin, and f.a.s. foreign port for export to Purchasers B & C], (i.e., lines 1 + 2 + 3):	$157.00	$119.50	$119.50
8.-ocean freight, insurance duty, inland U.S. transp. on transfer to affiliated U.S. sales company (Col. B), and to unrelated U.S. purchaser (Col. C):		$10.00	$10.00
9.-general selling expenses of the U.S. importers in reselling the imported merchandise in the U.S.:		$15.00	$15.00
10.-credit costs incurred by U.S. importer's in reselling the imported merchandise in the U.S. market (30 day terms)		$1.50	$1.50
11.-warranty costs in the U.S. market (not recovered from manufacturer):		$3.50	$3.50

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
12.-U.S. importer's addition for profit on its resale of the imported merchandise in the U.S.:		$22.50	$22.50
13.-price at which the imported merchandise is resold in the U.S. market by the importer: [prices in a free market, such as the U.S. are, of course, set in response to the interaction of supply and demand, and not merely on the basis of aggregate costs; for the purpose of this illustration, the price at which the importers resell the imported merchandise in the U.S. market is shown as the sum of their costs plus their addition for profit (an amount which itself would reflect the price effects of the supply/demand equation); viz., lines 7 + 8 + 9 + 10 + 11 + 12]		$172.00	$172.00
14.-The "foreign market value" or "fair value" of the merchandise under investigation, for comparison with the arm's length selling price for export (i.e., the "purchase price", Column C) line 1, Column A compared with line 1, Column C:	$150		$112.50
15.--Margin of sales at less than fair value [or, the amount of antidumping duties to be assessed pursuant to Sec. 751 review determinations] when foreign market value is compared with purchase price:			$37.50

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
16. The 'foreign market value' or "fair value" of the same merchandise for comparison with the "exporter's sales price" of the like merchandise sold or transferred to the foreign producer/exporter's U.S. sales affiliate, calculated as follows: Home market price, line 1	$150		
17. Exporter's sales price, (line 13 - (line 2 + 3 + 8 + 9 + 10 + 11):		$135	
18. Less adjustments, as follows:			
-for exporter's sales price offset (line 6 capped by line 9):	($15.00)		
-for credit cost (line 4, Col. A; line 10, Col. B)	($4.50)	($1.50)*	
-for warranty cost (line 5, Col. A, line 11, Col. B))	($5.00)	($3.50)*	
19. Adjusted foreign market value	$125.50		
20. Adjusted exporter's sales price		$135.00	
21.-Margin of sales at less than fair value [or, the amount of antidumping duties to be assessed pursuant to Sec. 751 review determinations] when foreign market value is compared with exporter's sales price after adjustments both for the exporter's sales price offset and the circumstance of sale adjustments in the home market, and in the resale in U.S. market:		$0.00	

* Items already deducted out of line item 17.

[Continued on next page]

Description	Column A Sale to Unrelated Purchaser A in Country/Origin (Foreign Market Value)	Column B Transfer to Related U.S. Purchaser B ("Exporter's Sales Price" Value)	Column C Sale to Unrelated U.S. Purchaser C ("Purchase Price" Value)
22.- Margin of sales at less than fair value if the exporter's sales price offset were disallowed, and if the circumstance of sale expenses in the home market versus those in exporting the merchandise to the U.S. were to be allowed as adjustments to the respective values being compared, as follows:			
----Home market price, line 1	$150		
----Exporter's sales price, (line 13 - (line 2 + 3 + 8 + 9):		$135	
-----Less adjustments, as follows:			
-for exporter's sales price offset:	($0.00)		
-for credit cost (line 4, Col. A and Col. B)	($4.50)	($4.50)	
-for warranty cost (line 5, Col. A and Col. B))	($5.00)	($5.00)	
23. Adjusted foreign market value	$140.50		
24. Adjusted exporter's sales price		$125.50	
25. Margin of sales at less than fair value		15.00	

As should be painfully obvious, the effect of the ITA's policy is to reduce the foreign market value, and consequently the dumping margins, by the full amount of credit costs and other expenses incurred in the home market. Once again blatant price discrimination is being explained away in the case of related party transactions--a result at obvious odds with the Congressional mandate to administer the laws in a manner to put an end to the price discrimination. [H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979)]

(e) The ITA further reduces dumping margins by averaging home market prices for comparison with specific export prices.

Subsection (f) of Sec. 773 of the Act [19 U.S.C. § 1677b(f)] permits the ITA to "use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required." The administering authority has interpreted section 773(f) to permit the use of weighted-average home market prices as the preferred method for calculating foreign market value whenever less than 80 percent of all home market sales are made at a single price. [See, e.g., undated Memorandum for Case Handlers and Supervisors from Frank R. Brennan, re Choice of method for establishing Foreign Market Value] The use of weighted average by the ITA, while in certain situations perhaps reducing the workload of the administering authority, can result in the elimination of evidence of price discrimination.

Typically, the ITA compares the United States price on the date of exportation or date of sale with a weighted-average home market price derived from prices taken from transactions throughout the period of investigation. The ITA converts the weighted-average home market price to U.S. dollars according to the exchange rate on the date of the U.S. price transaction, i.e., the date of exportation or the date of purchase.

By taking the weighted average of the home market prices reported over the entire period the ITA may eliminate the dumping margins on particular transaction dates. To give a simple example, assume the following:

Date of sale:	January 1	July 1	December 1
Home market price in Japan:	Y22,500	Y25,000	Y27,500
Exchange rate:	$1=Y235	$1=Y235	$1=Y235
Home market price Converted to dollars on date of HM sale:	$95.74	$106.38	$117.02
Average Home market price Jan.1-Dec.1:		Y25,000	
Average Home market price converted to dollars on date of US sale:	$106.38	$106.38	$106.38
U.S. price on date of sale:	$107	$107	$107
Margin of dumping based on average home market price:	0	0	0
Margin of dumping based on transaction by transaction comparison:	n/a	0	$10.02

The example assumes a home market price of one widget of 22,500 yen on January 1, 25,000 yen on July 1, and 27,500 yen on December 1, reflecting rising production costs. The United States price, based on three sales in the United States on January 1, July 1, and December 1, is $100 on each date, the Japanese producer not raising its U.S. price to meet its rising costs. The ITA would average all of the home market sales between January 1 and December 1 yielding an average home market price of 25,000 yen. Then the ITA would convert the average home market price in yen to dollars on the date of a particular U.S. transaction (for simplicity remaining at $1=Y250 throughout the year in this example). In the above example, the Japanese producer was engaged in price discrimination adverse to U.S. interests in December, but the ITA's method of calculation would show a 0% dumping margin.

The ITA's current approach makes the existence of dumping in part dependent upon the time period considered. Where the foreign producer has been dumping at some point in time but not continuously during the period selected for averaging home market prices, the existence of some sales in the home market at prices below United States price become in effect a credit to the foreign manufacturer against the amount of dumping liability imposed. The use of averaging fails to uncover discriminatory pricing practiced by the foreign producer during particular selling seasons.

The ITA's use of averaging and sampling techniques, moreover, extends to the point where the ITA permits the foreign respondents to calculate the averaged adjustments. For example, in the case of portable electric typewriters from Japan, the ITA in its preliminary determination permitted the foreign respondents to submit average interest costs, terms of payment, inventory carrying charges, and so forth. [47 Fed. Reg. 43992-93] This practice encourages foreign respondents in antidumping duty investigations and reviews to arrange and allocate costs and expenses eligible for consideration as deductions from home market prices so as to yield averages which when applied to average home market prices greatly reduce or totally eliminate margins of price discrimination.

In addition, the ITA has also calculated United States prices on the basis of average deductions for various selling expenses, notwithstanding the fact that section 773(f) of the Act by its terms applies only to foreign market value. The effect of this practice is to enable foreign respondents to buffer dumping margins by applying the imputed credit of negative margins on fairly traded transactions to the positive margins of dumping on unfairly priced transactions, thereby shielding the dumping transactions from off-setting antidumping duty assessments. Thus, the ITA's practice of using and accepting foreign respondent calculations of averaged claims for allowances to home market price dilutes the dumping margins on particular transactions and in general reduces or eliminates liability for dumping duties. While this frustration of the Congressional intent that price discrimination be neutralized by the assessment of dumping duties on an entry by entry (transaction by transaction) basis has been brought to the administering authority's attention (e.g., in the ongoing section 751 review on portable electric typewriters from Japan), the administering authority has not revised its methodology.

While this section of the statute was adopted to enhance timely completion of the administrative process [e.g. S. Rep. No. 249, 96th Cong., 1st Sess. 96], the use of computer technology by the administering authority in calculating the dumping margins in "big" cases (e.g., the steel cases) demonstrates that the ITA has the capability, if supported by adequate appropriations from Congress, to make all calculations on a transaction by transaction basis.

> (f) Dumping margins are further reduced or eliminated by the statutory mandate that export prices be increased by the amount of indirect taxes rebated on exports.

Section 772(d)(1)(C) of the Act [19 U.S.C. § 1677a(d)(1)(C)] requires the price to the United States from the foreign producer to be increased by the amount of any so-called "indirect" taxes collected upon merchandise sold in the home country but rebated or not collected upon merchandise exported to the United States, the latter increase "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."

As has been eloquently demonstrated by Mr. John J. Nevin, Chief Executive Officer and Chairman of the Board of Firestone Tire & Rubber Company, in the recent issue of Harvard Business Review [March-April 1983, pages 88-95], while GATT and U.S. practice (as approved by the Supreme Court in the Zenith case), permit the rebate of so-called "indirect" taxes without incurring the risk of countervailing duties, the main loser of such a result, considering the very different tax systems in the United States and our major trading partners, is American industry and American labor. Competition should not be premised upon tax policy, but upon comparative advantage. U.S. goods are penalized upon export because of U.S. tax policy, while foreign goods from Japan or the EC receive a major price advantage when exported to the United States because of the structure of their tax policies.

In the antidumping proceedings against bicycle tires and tubes from Taiwan, the trifling margins of dumping or negative findings of dumping have been premised in substantial part upon the statute-mandated addition of tax and import duty rebates on exports to the United States Price of the imported merchandise.

The policy question posed for the Congress is, "Should American industry be materially injured with impunity by foreign producers on the basis of the price discrimination advantage which their governments confer upon exports through tax and customs duty measures that are not duplicated by the United States?

This issue is raised at greater length in the countervailing duty section of this presentation. It has been addressed in the antidumping section to show that a type of price discrimination (when examining the price to the purchaser) is excused away not by administrative interpretation but by Congressional mandate.

(g) Investigations concerning State-controlled Economies

One issue of general concern to the effective administration of the antidumping duty law, although not yet directly affecting any of our clients represented here, is the treatment of possible dumping from state-controlled economies (SCE's). It is an issue on which this Subcommittee has specifically requested comments. [Subcommittee on Trade Release # 3, February 15, 1983] Section 773(c) of the Act [19 U.S.C. (1677b(c)] presently provides:

> If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine that foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either--
>
> (1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled-economy country or countries is sold either--
>
> (A) for consumption in the home market of that country or countries, or
>
> (B) to other countries, including the United States; or
>
> (2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or country as determined under subsection (e).

In the investigations of imports from possible SCE's to date, much time and expense has been spent on two issues: (1) whether the country is in fact a SCE for the purposes of the Act; and (2) which non-SCE, or "surrogate country" should be used instead of the SCE. For example, in Natural Menthol from the People's Republic of China [46 Fed. Reg. 24614], the petitioner submitted information on the question of whether the PRC was a state controlled economy for purposes of the antidumping duty law in five documents (in addition to the petition) and information on which country should be the surrogate country in twelve documents. Similarly, in Carbon Steel Plate from Romania [Notice of Suspension of Investigation, 48 Fed. Reg. 317 (January 4, 1983)], counsel for Romania presented arguments that it was not an SCE, although it more strongly argued that Romania's prices to third countries were appropriate for foreign market value, requiring significant responses by the domestic industry participants. Under the present system, despite what is fairly clear legislative history that communist countries (with the possible exception of Yugoslavia) are intended to be viewed as "state-controlled" for purposes of the law [e.g., 19 C.F.R. § 53.5(b)(1968); 116 Cong. Rec. H 10491-92 (daily ed. Nov. 18, 1970)(statement of Chairman Mills); S. Rep. No. 1431, 91st Cong., 2d Sess. 277 (1970); Trade Reform: Hearings Before the House Ways and Means Committee on H.R. 6767, 93d Cong., 1st Sess. 443-445 (1973); 119 Cong. Rec. H 10996-97 (daily ed. Dec. 10, 1973); Trade Reform Act of 1973: Hearings Before the Senate Finance Comm. on HR 10710, 93d Cong., 2d Sess. 225-26 (1974); S. Rep. No. 1298, 93d Cong., 2d Sess. 174 (1974); T.D. 78-260, 43 Fed. Reg. 35263], there is no certainty that any country (even the USSR) will be finally found to be state-controlled for purposes of any particular investigation. [See generally the preliminary and final determinations in Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3258, 46 Fed. Reg. 24614] Moreover, there is no reasonably certain way of identifying which country will be chosen for purposes of the surrogate provisions. The result is considerable expenditure of time by all parties involved in attempting to resolve these threshold issues that stand in the way of prompt resolution of the antidumping controversy.

Proposals for Change

1. *Statutorily prohibit the ESP "Offset" [Pass S. 539]*. On February 22, 1983, Senator Goldwater introduced S. 539, a bill which, *inter alia*, specifically does away with the ITA's "exporter's sales price offset" by adding a subsection (a)(5) to section 773 of the Act which prohibits making an adjustment to foreign market value for general selling expenses. [19 U.S.C. § 1677b] *Each of the companies represented here today by our firm strongly endorse Senator Goldwater's bill to eliminate the "offset"*. *If Congress were to make only one change to the antidumping law, the elimination of the offset practice of the administering authority would provide dramatic improvement in the effective enforcement of the vast majority of the outstanding dumping orders and in the consideration of pending and future antidumping investigations*. For example, dumping margins in the portable electric typewriter review would be increased by as much as *$25 per typewriter* for two of the major Japanese producers if the offset were eliminated.

The elimination of the offset (which could also be achieved by a revocation of section 353.15(c) of the agency's regulations) would not only plug one of the most flagrant loopholes in the present administration of the antidumping law, but would also reduce the workload of the administering authority and the effort and expense required to be applied by the domestic producers and simplifies the calculations to be done by the agency and, hence, is in accord with one of the stated objectives of the Subcommittee in reviewing the antidumping statutory provisions.

If for any reason, Congress is not prepared to adopt S. 539 or a bill with comparable language so as to eliminate the unacceptable results mandated by the offset, the domestic producers on whose behalf we speak today urge the Congress, at a minimum, to reformulate the basis for determining foreign market value to minimize the incentive to dump given to foreign producers with related importers. While stressing our considered opinion that the approach of S. 539 is preferable and more straight-forward than the alternatives, we submit for the Subcommittee's consideration one alternate approach:

Compare the "exporter's sales price" as presently defined (but modified to deduct the actual profit of the U.S. importer in the resale of the merchandise imported from its affiliated foreign producer/exporter) with a foreign market value determined pursuant to subsection (e) of section 773 of the Act, i.e., with the merchandise's constructed value. By subtracting out the profit in fact added by the related importer in its resale of its parent's merchandise in the U.S. market, to determine exporter's sales price, the Congress would be providing a true proxy of an arm's length price to an unrelated U.S. importer. Using constructed value for determining foreign market value eliminates the need to consider any adjustments and hence would simplify what information foreign producers would have to submit.

While the alternative is not as acceptable as Senator Goldwater's bill, some alternative which curtails the related-party license to dump is a very high priority of domestic producers in any modification of our unfair trade laws.

2. Modify Section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)].

We propose the following modification to section 773(a)(4) of the Act to eliminate the presumption created by the administering authority that differences in costs result in differences in prices:

> (4) Other Adjustments.--In determining foreign market value, if the foreign producer can demonstrate by clear and convincing proof that a difference in wholesale quantities, other differences in circumstances of sale directly related to the sales under consideration and/or a difference in merchandise (i.e., merchandise described in paragraph (B) or (C) of section 771(16) is used in determining foreign market value) has caused a difference in price between the United States price and the foreign market value (or caused the prices to be the same), the administering authority shall make an adjustment to foreign market value for the difference in price so caused up to, but not exceeding, the difference in cost proved by substantial evidence.

It is our belief that such a modification of section 773(a)(4) would result in significantly less expense for the domestic industry to participate meaningfully, as many of the unsubstantiated claims for adjustments routinely granted at present would necessarily be rejected. The result should be simplified calculations for the administering authority, improved efficiency for the agency and greater pressure on foreign producers to eliminate their price discrimination when selling into the United States marketplace.

3. Modification of Section 772(e) of the Act. The following proposed change to section 772 of the Act [19 U.S.C. § 1677b] would require the administering authority, in calculating the exporter's sales price, to deduct from the ESP any profits earned by the related-party

U.S. importer in order to arrive at a more accurate proxy for the price between the foreign manufacturer and an unrelated buyer in the United States.

> (e) Additional Adjustments to Exporter's Sales Price.--for purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of--
>
> (1) commissions for selling in the United States the particular merchandise under consideration,
>
> (2) profits earned by a related party importer after importation of the merchandise on resale of the particular merchandise in the United States, or if not so earned, a reasonable profit not less than 8% of net sales,
>
> (3) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and
>
> (4) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

Exporter's sales price was intended to be a proxy for the f.o.b. foreign port price. Thus, this amendment ensures that profits made by a related-party importer on resale to an unrelated customer (or a fixed profit percentage) would be backed out of the resale price in order that the exporter's sales price so derived will more closely approximate the price which the foreign manufacturer would have charged to an unrelated purchaser f.o.b. foreign port. As reviewed previously, the approach is permitted under the Antidumping Code and is followed by our major trading partners.

4. Modification of Section 773(a)(4). In order to prevent the massive reduction of foreign market value and the resulting reduction in dumping margins which currently occurs when the ITA compares foreign market value with United States price based upon exporter's sales price, the following language should be added at the end of section 773(a)(4) of the Act [19 U.S.C. § 1677b]:

> . . . except that adjustments to foreign market value described in paragraph (B) above would not be permitted when United States price is computed on the basis of exporter's sales price.

The proposed amendment would correct the major gap in the present administration of the law that permits price discrimination to be explained away by making adjustments for alleged differences in circumstances of sale even though U.S. price is a constructed price and the circumstances of sale to the related party are, by statute, to be ignored. This proposal would reduce the number of permissible adjustments to foreign market value, thereby saving time and effort on the part of the administering authority and the interested parties to the proceeding.

5. Elimination of Section 773(f). By removing the discretion of the administering authority to use averaging and sampling techniques in determining foreign market value, the proposed revision would end the current use of averaging which results in diminished effectiveness of the antidumping law. While economy of effort is an important consideration

in structuring the administration of a law, the use of averaging in the context of the goal of the antidumping duty law (to eliminate injurious price discrimination) is counterproductive to the interests of domestic industries as injurious price discrimination on a significant number of transactions can be explained away. The positive contribution to effectuating the unswerving intent of the Congress that price discrimination be eliminated through the neutralizing effect of the proper and prompt assessment of antidumping duties which would be achieved by this reforming amendment would be significant. The additional effort required of the administering authority, on the other hand, given its now acknowledged computer resources and capability should be acceptable in light of the Congressional and administration's statements that our unfair trade laws are to be administered vigorously and in a manner to put an end to the unfair trade practice complained about.

6. Modify Section 773(c) of the Act [19 U.S.C. § 1677b(c)]. Congress could eliminate the uncertainty and reduce the expense in bringing an antidumping action against products from countries believed to be state controlled by modifying section 773(c) of the Act to read as follows:

> (c) State-controlled Economies.--The administering authority will publish by the end of January each year a list of countries to be treated as "state-controlled" for purposes of this section. All Communist countries not specifically exempted by Act of Congress shall be treated as state-controlled. In addition, all countries in which the government's control of the inputs and outputs of production renders suspect the existence of market forces in the economy as a whole shall be deemed to be "state-controlled" for purposes of this section.

(2) If a country is state-controlled within the meaning of subsection (c)(1), the home market prices shall be determined on the basis of the normal costs, expenses, and profits as reflected by either--

(A) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of the surrogate country, as defined in subsection (c)(3) of this section, is sold or, if not sold, offered for sale --

(i) for consumption in the home market of that surrogate country, or, if there are no such sales or offers for sale in the surrogate country,

(ii) to other countries,

(B) if there are no such sales or offers for sale to any third country, the constructed value of such or similar merchandise in the surrogate country.

(3) Surrogate country is defined for purposes of this subsection as being the non-state-controlled-economy industrialized nation whose exports to the United States, as reflected in the U.S. import statistics of the Department of Commerce, during the three year period preceding the filing of the petition was closest in quantity to the exports from the state-controlled economy country, as determined by the U.S. import statistics of the Department of Commerce, during the same time period. By the end of January of each year, the administering authority will publish a list of countries deemed to be "non-state-controlled-economy industrialized nations" for purposes of this section.

This amendment would eliminate much uncertainty in the present administration of section 773(c). Parties would know in advance whether or not a country is an SCE, and a domestic industry would know in advance which country would be used as a surrogate country, and can collect information to determine whether there are sales at less than fair value on that basis. The test for the proper surrogate country is perhaps somewhat arbitrary, and may cut either way, for or against the domestic interested parties, but the increased certainty and in the streamlining of the procedure is believed worthy of trying.

Other Issues in the Antidumping Area

The above listing of problems in the administration of the antidumping law is not meant to be an exhaustive listing and doesn't include certain issues that have proven to be of great personal interest to individual domestic industry petitioners (e.g., burden of proof on petitioners to get an investigation commenced, an issue of particular interest to smaller companies and industries interested in bringing an action). However, the listing does identify major areas of conflict in the interpretation of the law--all of which seriously disadvantage U.S. industry in the marketplace by providing a legal umbrella over massive price discrimination being practiced by many of our foreign competitors. Prompt action by the Congress is imperative if our unfair trade remedy statutes are to assure that the conditions of fair trade upon which our nation's public policy as to imports is premised are to be restored and maintained. The Congress has oft declared this to be its intent in exercising its Constitutional authority for the regulation of foreign commerce. It is urgently necessary that the problems we have identified and discussed in the area of the administration of the antidumping duty law be constructively remedied. We believe our recommendations deserve most serious consideration to that end.

Issue #3. Substantive problems flowing from the interpretation of the countervailing duty law by the ITA

Many of the companies represented here today by our firm have been very concerned by the unfair competitive advantage received by many of their foreign competitors in the form of government or private party assistance. PPG Industries and other domestic glass producers have actively pursued in the Customs Court (now Court of International Trade) the correct interpretation of the term "bounty or grant" contained in section 303 of the Act [19 U.S.C. § 1303].- [See, e.g., ASG Industries v. United States, 82 Cust. Ct. 1, 467 F. Supp. 1187, rev'd 67 CCPA 11, 610 F. 2d 770 (1979); ASG Industries v. United States, 82 Cust. Ct. 61, 467 F. Supp. 1195, rev'd 67 CCPA 31, 610 F. 2d 785 (1979); ASG Industries v. United States, 82 Cust. Ct. 101, 467 F. Supp. 1200 (1979); ASG Industries v. United States, 85 Cust. Ct. 10, 495 F. Supp. 904 (1980)].

Similarly, Carlisle Tire & Rubber Company has actively participated in countervailing duty investigations against bicycle tires and tubes from Taiwan and Korea, while Roses Inc. has been involved in the countervailing duty investigations against roses from Israel, the Netherlands and Colombia, and American Spring Wire and Florida Wire, along with other domestic producers, have filed a series of countervailing duty petitions against prestressed concrete wire strand from South Africa, Spain, France and Brazil. Thus, our clients have extensive first hand experience in the administration of the countervailing duty law and with problems of interpretation flowing from that administration.

During the investigations that culminated in the final countervailing duty determinations in Certain Steel Products from Belgium, France, Germany, Italy, Luxembourg, the Netherlands, the United Kingdom, Brazil, and South Africa [47 Fed. Reg. 39304-95 (September 7, 1982)], the ITA developed a number of new methodologies to measure the amount of the net subsidies paid on the manufacture, production or export of merchandise imported into the United States. These new methodologies have been applied to all subsequent countervailing duty investigations, and, we believe, will be applied to all outstanding countervailing duty orders through the annual review process. The agency's acceptance of the need to measure the time value of subsidies made available to the foreign recipients and the recognition that certain foreign recipients were in fact uncreditworthy when benefits were bestowed have been major advancements by the ITA in the administration of the law. While there is still serious dispute over the correct measurement of the time value of money between domestic producers and the ITA, the domestic producers we represent here today strongly support the ITA's recognition of the business realities of "uncreditworthiness" and "time value of money" as directly affecting the measurement of the value of the countervailable benefits received by foreign producers/exporters.

The ITA's interpretation of the countervailing duty law gives rise to more fundamental issues which invite legislative oversight. The ITA has construed very narrowly section 771(5) of the Act and the scope of corrective action intended by the Congress by clinging to the very restrictive interpretations of the reach of the countervailing duty law adopted by the Treasury Department.

For purposes of this presentation, I will focus upon three areas of major importance where the agency's interpretation of what constitutes a countervailable subsidy has resulted in the agency's refusal to countervail against substantial government benefits bestowed on foreign competitors whose exports to the U.S. have caused significant competitive harm to domestic industries.

The interpretations of the agency of major concern to us (and which appear to ignore the legislative intent behind the statutory changes made in the Trade Agreements Act of 1979) are:

(1) The policy of the ITA to consider the extent to which the economic benefits conferred by foreign governments are made available to manufacturers, producers and exporters in the country of origin of imported merchandise. If the subsidy program is described in terms thought by the ITA to indicate that in theory at least the subsidy benefits are "generally available" to industry in the country of origin of the particular subsidized imported merchandise, then the ITA considers the economic benefits provided to the particular producers/exporters of the subject imported merchandise by that program not to be countervailable regardless of the economic advantage in the form of price leverage against domestic merchandise in the U.S. market which the program confers.

(2) The issue of down-stream subsidies: i.e., the policy of the ITA to refuse to consider and evaluate the extent to which a manufacturer who uses subsidized raw materials in his production of goods for export to the United States is himself benefitted to the extent of the subsidy conferred upon the production of the raw material.

(3) The policy position of the ITA that rebates of indirect taxes upon exportation by foreign governments using a "cascade" indirect tax system are nonexcessive, and therefore not countervailable.

In addition, I will review briefly the problems with the agency's interpretation of "critical circumstances"--a problem that applies as well in the administration of the antidumping law. Specifically, the ITA has shown an extreme unwillingness to invoke the critical circumstances provisions added to the law by the Trade Agreements Act of 1979 in harmony with the intent of the Congress. This subcommittee can make a major contribution to the achievement of its own clearly expressed intent for an effective administration of the countervailing duty law if through this legislative oversight it can achieve a correction of the flawed interpretation by the ITA of the critical circumstances and subsidy definition provisions of the Act.

Finally, I will review the problem domestic producers have been having with the administering authority's interpretation of its authority under the suspension provisions of section 704 (and 734) of the Act.

(a) The ITA significantly reduces the meaning of "subsidy" (and the related statutory term, bounty or grant) by refusing to countervail the benefits received by foreign producers/exporters whenever the programs under which such benefits were conferred appear to the ITA to be generally available to many industries in the country of origin.

The ITA has interpreted the language of section 771(5)(B) of the Act, added by the Trade Agreements Act of 1979 [19 U.S.C. § 1677(5)(B)], to allow it to determine that domestic subsidies that are available to a wide variety of industries in a country are not countervailable because they are "generally available." Section 771(5)(B) includes among its definition of subsidy, "domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries . . . ." The ITA explained in Appendix 4 to its final determinations in the steel cases [47 Fed. Reg. at 39320] (these appendices have since become a part of the general ITA official policy with regard to subsidies) that:

> Section 771(5) of the Act, in describing governmental benefits which should be viewed as domestic subsidies under the law, clearly limits such subsidies to those provided "to a specific enterprise or industry, or group of enterprises or industries." We have followed this statutory standard consistently, finding countervailable only the benefits from those programs which are applicable and available only to one company or industry, a limited group of companies or industries, or companies or industries located within a limited region or regions within a country. . . . We view the word "specific" in the statutory definition as necessarily modifying both "enterprises or industry" and "group of industries". If Congress had intended programs of general applicability to be countervailable, this language would be superfluous and different language easily could and would have been used. All governments operate programs of benefit to all industries, such as internal transportation facilities or generally applicable tax rules. We do not believe that the Congress intended us to countervail such programs. . . .

The legality of the administering authority's position is being challenged in Court. [E.g., Carlisle Tire and Rubber Company v. United States, Court No. 79-5-00748; Bethlehem Steel Corporation v. United States, Court No. 82-10-01369] Regardless of the present doubtful legality of the ITA's interpretation, we believe that such a construction of the statutory language does not provide the corrective intended by the Congress to the unfair tilting of the conditions of competition in the open American market by foreign governments intervening in the marketplace to enhance the competitive advantage of their producer/exporters by the conferring of cost-reducing economic benefits which flow through to the price/cost basis of products exported to the United States. By reason of the benefits received by specific foreign producers/exporters under "generally available" programs, competition between their products exported to the United States and domestically produced merchandise is not fair competition; it is not based on comparative advantage. The ITA's policy not to countervail such market-distorting economic benefits fails to "catch within the scope of our law as many unfair trade practices as we can." [Remarks of Senator Heinz, 125 Cong. Rec. S10,313 (daily ed. July 23, 1979)]

The importance of the "generally available" issue to the proper administration of the countervailing duty law is substantial. A review of the countervailing duty investigations commenced in the last three years demonstrates that the issue appears in a large proportion of the petitions filed.

We believe the interpretation which is required to effectuate the overall intention of the Congress that the countervailing duty law be administered effectively so as to neutralize unfair foreign government intervention in competition in the American market through the conferring of economic benefits on their producers/exporters, is as follows:

economic benefits conferred upon producers who export their production to the United States under programs described in language which makes them appear to be "generally available" to any of a wide range of producers who qualify under the terms of the programs, are nevertheless countervailable, because the unfairness which must be neutralized if fair competition is to be preserved between imported and domestic goods in the U. S. market is the effect upon competition in the American marketplace of the benefits conferred upon the production or exportation of goods imported into the United States rather than the generality of the writ under which producers can claim and receive such benefits. That programs made available to a wide range of industries are still countervailable, doesn't render the quoted language of section 771(5)(B) superfluous, but rather makes the language part of the overall scheme of the section that progressively closes off possible avenues for circumventing the reach of the law:

> Subsidies can be provided either directly by private parties or by the government or its agencies or be required by government action;
>
> Subsidies can be provided either to a specific enterprise or industry, or to a group of enterprises or industries;
>
> The industries can be publicly or privately owned;
>
> The benefits may be paid or bestowed either directly or indirectly; and
>
> The benefits may be paid or bestowed on the manufacture, production, or export of the merchandise.

Some examples may serve to show the anomalous results of the ITA's current policy position on the issues of interpretation. One of the earliest examples of the agency's interpretation under the new Act occurred in the investigation of Fresh Cut Roses from Israel [45 Fed. Reg. 58516-19 (September 4, 1980)]. Roses Inc. had alleged that government funded extension services provided to rose growers constituted a countervailable bounty or grant. "These services consist of various programs designed to assist farmers in such areas as production economics, water and soil use, farm mechanization, plant protection and applied research. In addition, training courses are provided for new farmers." [45 Fed. Reg. at 58519] The ITA determined that these services did not constitute subsidies to the rose growers, even though such services are both "the provision of goods or services at preferential rates" and "the assumption of any costs or expenses of manufacture, production, or distribution." [See section 771(5)(B)(ii) & (iv) of the Act]. The ITA explained:

> These services are available to all sectors of agriculture and are not directed exclusively to rose growers or any other sector of agriculture. Further, similar agricultural services are provided in many other countries and are considered a normal function of government. [45 Fed. Reg. at 58519]

We cannot imagine that Congress intended that agricultural subsidies are exempt from the reach of the countervailing duty law because the subsidies are given to the entire agricultural sector rather than being targeted to the specific good under investigation. Further, the criteria cannot be whether a large number of countries also engage in the practice. Many countries provide export subsidies, and consider that to be a normal function of government, but that does not make the practice any less countervailable, if a domestic industry is being injured by the imported merchandise in question. The ITA was no doubt concerned that if government funded extension services were countervailed, then perhaps public elementary school education would be countervailable. These fears are unfounded. Public elementary school education is not "provided . . . to a specific enterprise or industry, or group of enterprises or industries." Government funded extension services to the agricultural sector are provided to a group of industries.

PPG Industries was a part of a group of domestic float glass producers who filed a petition in 1974 alleging that certain domestic programs in Belgium, West Germany, France, Italy, and the United Kingdom constituted bounties or grants. The programs bestowed investment grants, preferential loans, tax incentives, and other benefits on industries that were in or moved to certain regions, such as the Mezzogiorno in Italy. The benefits were available to all enterprises and industries within the region. The Treasury Department was not inclined to countervail the benefits from these programs, but the ASG cases previously cited, most importantly ASG Industries, Inc. v. United States, 82 Cust. Ct. 101, 467 F. Supp. 1200 (1979), specifically held that such programs bestowed bounties or grants, and the legislative history to the Trade Agreements Act of 1979 left no doubt that Congress intended regional development programs to be counted as subsidies. [See, e.g., H.R. Rep. No. 317, 96th Cong., 1st Sess. 74 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 86 (1979); 125 Cong. Rec. S 10313-14 (daily ed. July 23, 1979)(colloquy between Senators Heinz and Ribicoff)]. The ITA has therefore accepted that generally available subsidies on a regional level are countervailable. It even advanced a rationale for countervailing generally available regional subsidies in Appendix 4 to the steel investigations, in response to an EC objection to countervailing against regional subsidies:

> While there is no agreed definition of the term "normal competition" in the context of the GATT, the term can reasonably be construed to include comparative advantage, a concept about which little, if any, serious dispute exists among economists. The argument of the EC flows against the logic of comparative advantage. Subsidies used to alter the comparative advantage of certain regions with respect to the production of a certain product or products are by definition distortive of trade and the allocation of resources, and, therefore, must affect normal competition, including competition with producers in the market of the importing country. [47 Fed. Reg. at 39330.]

We agree that domestic regional development programs are trade distortive, but it must be remembered that the countervailing duty law is concerned with distortions of trade vis-a-vis other countries. If a regional development program distorts international trade, why does the trade distortive effect of a program disappear when the scope of the program is broadened from regional to national? Obviously, it does not. The fact that a foreign government decides to subsidize its entire spectrum of production to make the array of industrial, mineral and agricultural products more competitive in the export trade merely means that the most open market in the world, the United States, is confronted with an assault from every industrial, mining and agricultural sector of a foreign competitor rather than merely selected industrial, mineral, or agricultural products.

The ITA produced an even more anomalous result in the investigation of Certain Steel Products from the Federal Republic of Germany [47 Fed. Reg. 39345-56 (September 7, 1982)] when it determined that generally available benefits bestowed by the individual West German states were not countervailable, even though they would have been countervailable had the Federal Government had bestowed the same benefits to the same industries in that state. [47 Fed. Reg. at 39350] How can the trade distortive effect of a program change depending on whether a national or a state government gave the money to the industry? Obviously, it cannot.

American Spring Wire Corp. and Florida Wire & Cable Co. were a part of a group of domestic producers of prestressed concrete steel wire strand (PC strand) who filed a petition alleging that subsidies were being bestowed on the manufacture and export of PC strand from Brazil, among other countries. The petition alleged that the Brazilian manufacturer of PC strand received, inter alia, preferential long-term loans from the government at rates significantly below Brazilian inflation rates and significantly below Brazilian short-term interest rates. Nevertheless, the ITA determined that the loans were not subsidies:

> Long-term financing in cruzeiros is normally available in Brazil only through government-controlled financial institutions. Belgo-Mineira has received loans from FINAME, a program of the government-controlled National Bank for Economic Development (BNDE), for the purchase of capital equipment manufactured in Brazil. These loans are fully-indexed by ORTN and were made a fixed real interest rates ranging from 8 to 11 percent.

> FINAME loans are available to a wide variety of sectors in Brazil. The steel industry has received such loans in proportions similar to other large capital-intensive industries in Brazil. This appears to be warranted by the capital requirements of such industries. In addition, numerous other sectors also received loans from FINAME during this period. Based on the general availability of these fully-indexed loans, we have determined that they do not confer a subsidy. [48 Fed. Reg. at 4519 (February 1, 1983)]

The logic of the law does not support the result reached by the ITA. The Brazilian government has undertaken to become a banker for those industries that have large capital requirements, wish to borrow on a long-term basis, do not wish to go into the international market to borrow and are not willing to pay domestic market short-term rates. The government provides these selected industries with loans that they would not otherwise be able to obtain from the private sector (at least at the interest rates given them by the government). Yet the ITA determined that the loans to the PC strand producer did not confer subsidies, because such loans are made available to all capital-intensive industries in Brazil by the government at below-market rates. To borrow a statement from Senator Heinz made during the floor debates on the Trade Agreements Act of 1979 with respect to regional grants, "The difficulty with this theory [of the ITA's] is that this type of subsidy is functionally no different than any subsidy that has the purpose of eliminating a comparative disadvantage." [125 Cong. Rec. S 10314 (daily ed. July 23, 1979)(bracketed material added)]

The ITA's strict limitation of countervailable subsidies to those provided to specific industries or groups of industries under cover of the illustrative language in the definition of subsidy at Sec. 771(5) of the Act ("domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries") sets at naught the language of the report of the Committee on Ways and Means in its report on the '79 Act: "The Committee does not intend for this to be a comprehensive, exclusive enumeration of domestic practices which will be considered subsidies. It is a minimum list, an identification, for purposes of clarification, of those practices which are definitely subsidies. In deciding whether any other practice is a subsidy, the standard remains that presently used with regard to a 'bounty or grant' under section 303." [H. Rep. 96-317, p. 74] Note well the language of the Court in construing "bounty or grant" under Sec. 303 in ASG Industries v. United States [67 CCPA 11, 610 F. 2d 770, 1 ITRD 1718 (1979)]: "To permit the Secretary to place a narrow or restricted interpretation on 'bounty' or 'grant' as a basis for a negative countervailing duty determination would clearly frustrate the Congressional purpose of 'assuring effective protection of domestic interests from further subsidies......' (citation omitted). Further, it would be inconsistent with the broad meaning of 'grant' long ago established by the Supreme Court in Nicholas & Co. v. United States, supra at 39: 'If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another.'" [1 ITRD at 1723] And, in a related case, the (then) United States Customs Court, in ASG Industries v. United States [82 Cust. Ct. 101, 467 F. Supp. 1200, 1 ITRD 1769 (1979)] held: "Unquestionably, the EFFECT of these programs has been to reduce [the foreign producer's] cost of producing float glass. And whether the reduction in cost is occasioned by direct cash payments, or by an act of government reducing labor cost, capital cost, or the cost of any other factor of production is of no consequence. For if a benefit or advantage is received in connection with the production of merchandise, that benefit or advantage is a bounty or grant on production. And to the extent that such bountied merchandise is exported to the United States, it comes squarely within our countervailing duty law -- section 303." [1 ITRD 1778 (bracketed material added)]

Notwithstanding the authoritative meaning of the law by the courts, the ITA persists in its restrictive construction of the law: as a result, under the agency's present interpretation of the law, domestic producers are confronted by foreign competitors who have received massive payments from their government under the guise of "generally available" programs without any prospect for relief. We believe that the ITA's interpretation is an effort to mollify our nation's trading partners by narrowing the scope for interpreting our domestic law and the legislative intent by over-arching attention to the text of the international countervailing duty/subsidies code. But even there, it is plain that the ITA gives an unduly restrictive reading to the text of the agreement which in pertinent part reads as follows:

> "3. Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital.
>
> "The signatories note that the above forms of subsidy are NORMALLY granted either regionally or by sector. The enumeration of forms of subsidy set out above is illustrative and non-exhaustive, and reflects those currently granted by a number of signatories to this Agreement." [Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, MTN/NTM/W/236, page 23, Article 11, ¶ 3, reprinted in House Document No. 96-153, Part I, 96th Cong., 1st Sess. 281 (1979) (Emphasis added to the word "normally"; emphasis quoted on words "inter alia")].

Quite clearly, the text quoted above leaves open the possibility that the described (but illustrative, not exhaustive) examples of countervailable subsidies, though normally granted regionally or by sector, could be granted otherwise. How otherwise? By programs general in their description under which benefits flow seriatim to specific applicant producers or industries!

> (b) The ITA refuses to give effect to the statutory definition by which "subsidies" include "indirect" benefits by ignoring the countervailable benefit received by finished goods manufacturers using subsidized raw materials ["downstream subsidies"]

American Spring Wire Corp. and Florida Wire & Cable Co. were a part of a group of domestic producers of prestressed concrete steel wire strand (PC strand) who filed a petition alleging that subsidies were being bestowed on the manufacture and export of PC strand from Spain, among other countries. The petitioners alleged, inter alia, that subsidies bestowed on producers of wire rod or steel billets used in the manufacture of PC strand constituted indirect ("down-stream") subsidies on the manufacture of PC strand, and therefore were countervailable. The ITA rejected this allegation in its final determination:

> The benefits allegedly conferred by the Spanish government on the primary carbon steel industry would have to be determined to benefit the PC strand industry specifically in order to constitute a countervailable benefit to the PC strand producers. We cannot assume that benefits conferred by the government to one party are passed through to another party without looking at the economic environment surrounding those industries. Petitioner's claim that benefits to wire rod producers are automatically passed through to PC strand producers does not conform with the economic realities of steel consuming industries. This is particularly true when one gives consideration to the concept of "own" price elasticity of demand. It is generally in the commercial interest of a firm receiving a subsidy not to share the benefits with its customers. Hence, when Spanish wire rod producers sold to many different industries and where Spanish PC strand producers bought from several sources, there is no reason to believe that any possible subsidy to the wire rod industry was passed on specifically to the PC strand industry. [Final Affirmative Countervailing Duty Determination, Prestressed Concrete Steel Wire Strand from Spain, 47 Fed. Reg. 28723, 28726 (July 1, 1982).]

The issue of these so-called "down-stream" subsidies was also a major issue in the countervailing duty investigations of certain carbon steel products from Europe. When the steel petitions were filed against European carbon steel products, each of the petitioners alleged that subsidies to the European coal producers constituted subsidies to the

European steel producers. The issue was contested most vehemently with regard to German coal, as West Germany essentially forbade the importation of coal from other countries, and the German steel producers owned the major subsidized coal producer. The ITA nevertheless managed to determine that there was no subsidy, because the coal was not being sold at below the world market price, and the import restrictions were "inseparably linked with the benefits paid to the FRG coal industry." [Final Countervailing Duty Determinations; Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39345, 39351 (September 7, 1982)] As a result, _de minimis_ net subsidy amounts were found for most German steel producers.

Another petition filed by American Spring Wire Corp. and Florida Wire & Cable Co. as a part of the group of domestic PC strand producers concerned PC strand from France, where the foreign producer was wholly owned by Usinor, an integrated steel producer found by the ITA to be heavily subsidized. [_See_ Final Affirmative Countervailing Duty Determinations; Certain Steel Products from France, 47 Fed. Reg. 39332-45 (September 7, 1982)] Here, too, the ITA found that no subsidy was passed from the subsidized supplier to the purchaser. The ITA believed that "benefits bestowed upon the manufacturer of an input do not necessarily flow down to the purchaser of that input, if the sale is transacted at arm's length. In an arm's length transaction, we believe it is reasonable to assume that the seller generally attempts to maximize its total revenue by charging as high a price and selling as large a volume as the market will bear." [47 Fed. Reg. 47031, 47035 (October 22, 1982)] The ITA had verified that "the prices charged by Usinor for wire rod were comparable to prices for the same quality of wire rod from suppliers outside of France," and that the PC strand producer "pays no less for Usinor's wire rod than the largest unrelated purchaser of Usinor's wire rod." [Id] From this, the ITA concluded that the transactions were at arm's length, and therefore no subsidy was received by the purchaser.

While the issue of downstream subsidization has only recently been presented to the administering authority in a significant number of cases, the importance of the issue both in those cases and to the proper administration of the countervailing duty law cannot be underestimated. For example, domestic industries may face competition from foreign motor vehicle and appliance producers who purchase subsidized steel, plastic or other construction materials, or from foreign electronic consumer and office producers that use electronic components developed with the assistance of massive government funding. How the Congress chooses to handle this and the other issues discussed herein may well determine whether the United States maintains a competitive industrial base in the years ahead.

(c) The statutory exclusion of indirect taxes rebated on exported products from countervailing duties operates uniquely against U. S. commerce where domestic producers are burdened by direct taxes not eligible for rebate on exports, and receive no off-setting assistance by imposition of border taxes on imports to equalize the tax burden of domestic and imported goods sold in the U. S. market: rebates of indirect taxes upon export

Annex A of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), incorporated into the Tariff Act of 1930 by section 771(5)(A) [19 U.S.C. § 1677(5)(A)], paragraph (g), defines export subsidies to include "[t]he exemption or remission in respect of the production and distribution of exported products, of indirect taxes *in excess* of those levied in respect of the production and distribution of like products when sold for domestic production." (Emphasis added.) The practice of only countervailing against *excessive* remissions of indirect taxes has long been followed by the Treasury Department, a practice upheld by the Supreme Court [*see* *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)], and approved by the Congress. For example, the Senate Finance Committe Report on the Trade Agreements Act of 1979 [S. Rep. No. 249, 96th Cong., 1st Sess. 84-85 (1979)] says that "the restrictions on offsets contained in section 771(6) ... are not intended to prohibit the authority from determining that export payments are not subsidies, if those payments are reasonably calculated, are specifically provided as non-excessive rebates of indirect taxes within the meaning of Annex A of the Agreement, and are directly related to the merchandise exported."

Most of this country's major trading partners rely more heavily on so-called "indirect" taxes than does the U.S. The United States has agreed to follow this practice, even though it has been widely accepted for years that the system of assessing border taxes equal to the indirect tax burden on similar goods produced in the country and rebating an equal amount upon the export of the goods from the country "grant[s] an advantage to almost every major country trading with the U.S." [M. Leontiades, The Logic of Border Taxes, 19 Nat'l Tax J. 173, 182 (1966). See also J. Nevin, Doorstep for Free Trade, 61 Harv. Bus. Rev. #2, 88 (1983)]. If the U.S. allows its trading partners to have this tax advantage, it should at least allow no more advantage than is consistent with its international obligations. Moreover, for the reasons that have been so forcefully presented by Mr. Nevin, the Congress should move forcefully to return U.S. industry to a position of competitive parity by eliminating the tax advantage flowing to our trading partners by the outmoded concept that undergirds favoring countries with heavy indirect tax systems.

In examining whether the administering authority's interpretation of the statute and legislative history of section 771(5) of the Act has minimized the adverse consequences of excessive remissions of indirect taxes, we believe the answer must be "no" in the case of cascade tax systems, such as that used by Spain. In light of the legislative history and the examples given Annex A to the Subsidies Code, present agency treatment of these "cascade" tax rebates constitute an inexplicable denial of domestic industry rights to relief from excessive rebates of indirect taxes.

For example, paragraph (h) of the Annex includes among the definitions of export subsidies:

> The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowances for waste) in the exported product.

Note 3 to the Annex explains that "[p]aragraph (h) does not apply to value-added tax systems, and border-tax adjustment in lieu thereof and the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g)." Note 1 to the Annex defines "prior stage" indirect taxes as "those levied on goods or services used directly or indirectly in making the product." Note 1 also defines "cumulative" indirect taxes as "multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production."

Spain is an example of a country with an indirect tax system covered by paragraph (h). That is, it has a "cascade" tax, wherein an ad valorem tax is charged at each sales transaction up to the retail level, but unlike a value added tax (such as used by the European Communities countries) the seller cannot deduct the indirect taxes that were passed on to him when he purchased the inputs. Thus, the actual indirect taxes borne by a product may be more or less than the amount of tax assessed when the final product is sold, depending on the number and value of transactions involving the inputs. Further, the amount of indirect taxes borne by the same product would vary from company to company, depending on the degree of vertical integration of each company, with the more integrated companies having a definite tax advantage. Also, the actual amount of indirect taxes borne cannot be known, but can only be estimated. Lastly, in a value added tax system, since the manufacturer of the final product can deduct prior stage taxes when he pays the VAT upon the sale of his product, there is no preference for tax purposes (however, as noted in the previously cited articles by Leontiades and Nevin there is a competitive advantage vis-a-vis U.S. producers both in the U.S. marketplace and in the foreign marketplace) whether his products are sold in the home market or exported. In a cascade tax system, the manufacturer of the final product cannot deduct his prior stage taxes when he sells in the home market, but when he exports, the government rebates to him its estimate of the amount of those taxes. If the rebate is greater than the actual tax incidence born by the producer (virtually a certainty for any integrated producer), there is necessarily a cash incentive to export--stated differently, a subsidy on the exportation of the product in question and clearly countervailable under U.S. law.

When enacting the Trade Agreements Act of 1979, during the floor debates Senator Heinz singled out the Spanish cascade tax for comment:

Another major area of controversy in our negotiations with the administration was the concept of subsidy, both its definition and method of calculation. The existing countervailing duty law does not contain a detailed definition of a subsidy or bounty or grant. Similarly, the concept of net subsidy is undefined, which has led to some serious abuses by the Treasury Department in its attempt to reduce the amount of subsidy to levels sufficiently low to mollify our trading partners.

. . .

While rebates of value added taxes are excluded from the list of subsidies in the code . . . a difficult issue arises in the case of certain kinds of VAT-like cascade taxes such as the Spanish system, rebates of which are not strictly like rebates of a VAT, because they are not calculated on the exact basis of value added but rather are determined on the basis of an aggregate calculation which is not necessarily an accurate reflection of the real value added to a particular product. When this kind of cascade tax is rebated, individual exporters may receive a bounty in excess of the exact amount of tax paid earlier at various stages of production.

The language of the Senate Finance Committee report on page 85 appears to open the door very slightly to treating this kind of rebated tax as a VAT rather than as a countervailable subsidy. The language, however, is narrowly drawn by making clear that any payment excluded from the definition of subsidy must be reasonably calculated, specifically provided as a nonexcessive rebate of an indirect tax permissible under annex A of the code, and it must be directly related to the merchandise exported, as opposed to a more general rebate.

As in all cases in this statute, these terms are intended to be adhered to strictly, and the burden is on the recipient of the benefit or his government to show that the payment meets each of the above tests. I can assure the administering authority that many people in this country, including this Senator, will be closely watching any case that might fall in this category and will expect evidence to be thoroughly developed so that it is conclusively established that payments meet these tests. Personally, I am doubtful

> that the Spanish tax or any similar tax can meet these standards. *As the Sentor who offered the offset and subsidy definition language incorporated into the bill*, I can say it *was certainly not my intent that rebates of cascade taxes and the like be treated in this way*. *If they are, the administering authority had better have an airtight case*. [125 Cong. Rec. S.10312-14 (daily ed. July 23, 1979)(emphasis added)]

American Spring Wire Corp. and Florida Wire & Cable Co. were a part of a group of domestic producers of prestressed concrete steel wire strand (PC strand) who filed a petition alleging that subsidies were being bestowed on the manufacture and export of PC strand from Spain, among other countries. The petition quoted the above remarks, and urged the ITA to bear in mind that it was not to handle the rebates of the Spanish cascade tax in the same fashion as the Treasury Department had.

Instead, the ITA did nothing different than what the Treasury Department had done in prior investigations of Spanish products. It did not question the validity of the Spanish input-output tables, and it did not question the validity of the Spanish method of converting the input-output tables into the border tax schedules. Additionally, since the Spanish transaction tax rate had risen in 1981 and again in 1982, the ITA determined that the rebates of Spain's indirect taxes did not constitute a subsidy at all. [*See* Final Affirmative Countervailing Duty Determination, Prestressed Concrete Steel Wire Strand from Spain, 47 Fed. Reg. 28723, 28724-25 (July 1, 1982)]

(d) The ITA narrowly construes the critical circumstances provision of the '79 Act overly narrowly, denying to domestic producers the protection of retroactive application of dumping or countervailing duties against surging imports prior to the preliminary determination.

The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), Article 5, paragraph 9 sets out the internationally agreed upon procedure for applying countervailing duties retroactively:

> In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the General Agreement and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than ninety days prior to the date of application of provisional measures.

In implementing this provision into U.S. law, the House Ways and Means Committee Report (H.R. No. 317, 96th Cong., 1st Sess. 63 (1979) stated the purpose of the provision as it applied both to antidumping and countervailing duty law:

> The provision is designed to provide prompt relief to domestic industries suffering from large volumes of, or a surge over a short period of, imports and to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by the Authority.

The provision enacted in section 704(e)(1) provides:

> If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by the administering authority, then the administering authority shall promptly determine, on the basis of the best information available to it at that time, whether there is a reasonable basis to believe or suspect that--
>
> (A) the alleged subsidy is inconsistent with the Agreement, and
>
> (B) there have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

From the point of view of the domestic industry being injured by subsidized imports, there is no practical difference between domestic and export subsidies, and the harm from surging imports which overhang the market free from the reach of the law is identical. Thus, the limitation to subsidies which are "inconsistent with the Agreement" (interpreted by the agency as being limited to export subsidies), has resulted in significant surges of imports after the filing, or in anticipation of filing of countervailing duty (or antidumping) petitions with no effective relief possible.

The ITA has almost never found critical circumstances in either a countervailing or antidumping duty context. In the one time that a final critical circumstances determination was made in a countervailing duty context, in Certain Steel Products from Spain, 47 Fed. Reg. 51348 (November 15, 1982), the ITC voted negatively under section 705(b)(4) on the questions of whether "there is material injury which will be difficult to repair, and the material injury was by reason of such massive imports of the subsidized merchandise over a relatively short period." In order for the purpose of the provision--to deter importers and exporters from shipping in massive imports between the time of the filing of the petition and the suspension of liquidation at the time of the preliminary determination--to be effectively carried out, the statute should be modified.

(e) The ITA improperly terminates investigations after preliminary determinations of dumping and subsidization by entering into suspension agreements with foreign interests without prior meaningful consultation with domestic industry, on terms which are contrary to domestic parties' advice, and contrary to the intent of the Congress for the carefully limited use of suspension agreements.

With the enactment of the Trade Agreements Act of 1979, the administering authority was provided a statutory basis for suspending investigations in antidumping and countervailing duty proceedings where certain conditions were met, *viz*., the net subsidy is to be eliminated or offset completely, the agreement is in the public interest, and effective monitoring is possible. [19 U.S.C. § 1671c(b), (d); see also 19 U.S.C. § 1673c(b), (d)(comparable requirements in an antidumping proceeding)]

Suspension agreements have a praiseworthy, but intentionally limited, objective, as identified in the legislative history:

> The Committee recognizes the importance of this provision to both importers and domestic industry as a means of achieving the remedial purposes of the law in as short a time as possible and with a minimum expenditure of resources by all parties involved. [H.R. Rep. No. 317, 96th Cong., 1st Sess. 53 (1979)]

> Section 704 would also establish criteria and procedures for suspending an investigation upon acceptance of an agreement by a foreign government or exporters to take remedial action. The suspension provisions would implement Article 4(5) and (6) of the Agreement for the United States.
>
> The suspension provision is intended to permit rapid and pragmatic resolutions of countervailing duty cases. However, suspension is an unusual action which should not become the normal means of disposing of cases. The committee intends that investigations be suspended only when the action serves the interests of the public and the domestic industry affected. * * * Furthermore, the requirement that the petitioners be consulted will not be met by pro forma communications. Complete disclosure and discussion is required. [S. Rep. No. 249, 96th Cong., 1st Sess. 54 (1979)(Emphasis added)]

For certain countries who find themselves the focus of attention in a number of subsidy disputes across a wide range of products, the suspension agreement has become a common procedure for terminating the investigation. In 1982 and in the first several months of 1983, an extraordinary number of investigations were terminated by suspension agreement. [See, e.g., 48 Fed. Reg. 2158 (Roses and other Cut Flowers from Colombia); 47 Fed. Reg. 22137 (prestressed concrete steel wire strand from South Africa); 47 Fed. Reg. 47048 (prestressed concrete steel wire strand from Brazil); 47 Fed. Reg. 39394 (carbon steel plate from Brazil); 47 Fed. Reg. 42399 (carbon steel wire rod from Brazil); 47 Fed. Reg. 57551 (small diameter welded carbon steel pipes and tubes from Brazil); 48 Fed. Reg. 4703 (certain stainless steel products from Brazil); 48 Fed. Reg. 317 (carbon steel plate from Romania); 47 Fed. Reg. 54130 (wire rope from South Africa); (it is expected that a suspension agreement on galvanized steel wire strand from South Africa will be published this Spring); 47 Fed. Reg. 54987 (pectin from Mexico); 47 Fed. Reg. 54992 (polypropylene film from Mexico); 47 Fed. Reg. 42393 (carbon steel wire rod from Argentina)]

Moreover, the ITA often doesn't sign a suspension agreement until around the due date for a final determination by the agency, thus there is no time or expense saved at the adminstering authority level of the proceeding for the parties--one of the central objectives of the suspension agreement process. [See, e.g., 48 Fed. Reg. 2158 (Roses and other Cut Flowers from Colombia); 47 Fed. Reg. 47048 (prestressed concrete steel wire strand from Brazil)] In addition, the suspension agreement will be implemented even though there are a number of programs that the petitioner has alleged constitute countervailing subsidies and on which the ITA has inadequate information to make a decision or which for policy reasons the agency has refused even to investigate. [47 Fed. Reg. 22137 (prestressed concrete steel wire strand from South Africa); 48 Fed. Reg. 2453 (carbon steel plate from Romania)]

Finally, the administering authority will accept the agreement even where the basis of the agreement is the assessment by a foreign government which owns the foreign producer in question of an export tax allegedly equal in amount to the net subsidy determined to exist by the agency, and despite evidence submitted by the domestic producer during the comment period that prices from the foreign suppliers appear to be dropping in the U.S. market. [47 Fed. Reg. 39394 (carbon steel plate from Brazil)]

The domestic industry is left helpless to prevent the acceptance of a suspension agreement, despite no assurance that the pricing pressure will abate and despite the agency's refusal to consider the ongoing benefit to a company in terms of enhanced cash flow, improved facilities and reduced costs of production flowing from the subsidy programs that a foreign government agrees to terminate only after a spate of actions have been brought. A domestic industry's only remedies are to pursue relief through judicial review of the agency's action, or to commence an antidumping case against the same product for which no effective relief is forthcoming against subsidy practices.

Proposed Changes

1. Modification of section 771(5)(B) of the Act [19 U.S.C. § 1677(5)] To eliminate the problems arising from the administering authority's handling of "generally available" and "downstream" subsidies, we suggest that section 771(5)(B) of the Act be modified to read as follows:

> (5) Subsidy.--The term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 303 of this Act, and includes, but is not limited to, the following:
>
> * * *
>
> (B) Any domestic subsidy, regardless of general availability, if provided or required by government action to a specific enterprises or industry, or group of enterprises or industries (including all industries), whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture,

production, or export of any class or kind of merchandise. Such domestic subsidies include, but are not limited to the following categories:

> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
>
> (ii) The provision of goods or services at preferential rates.
>
> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.
>
> (v) The purchase of goods or materials from companies or individuals who themselves are the beneficiary of subsidies.
>
> [alternative for (v) The purchase of goods or materials which are physically incorporated into the imported product, which goods or materials are produced by companies who themselves are the beneficiary of subsidies.]

The proposed modification of section 771(5) of the Act clarifies what we believe was the original intent of the Congress in enacting section 771(5). The proposal does not treat government programs such as infrastructure development (unless undertaken for a specific company or group of companies) nor programs that are not provided to companies at all (e.g., social programs, education, etc.) as being countervailable. The other programs provide benefits to companies which reduce their costs below what they would have been, and hence should be countervailable if provided to producers or exporters whose product is found to cause material injury (or the threat thereof) to U.S. industries.

The addition of subsection (B)(v) addresses the downstream subsidy question in a manner likely to provide a broad mantle of protection to U.S. industries from what is likely to be an increasingly serious trade problem for U.S. industries, including U.S. high technology industries. Included as Exhibit 1 to this prepared statement is a copy of a submission made by our firm on behalf of a number of domestic producers concerning, *inter alia*, the question of downstream subsidies (pages 1-15). The letter reviews the proposition that a purchaser receives benefits at least as great as those bestowed on the supplier of an input by purchasing a subsidized input.

2. Modify section 771(6) of the Act [19 U.S.C. § 1677(6)]. Adding a subsection (6)(D) to section 771 of the Act would eliminate the problem of the excessive remission of "cascading" taxes:

> (6) Net Subsidy.--For the purpose of determining the net subsidy, the administering authority may subtract from the gross subsidy the amount of--
>
> * * *
>
> (D) "cumulative," "multi-staged" or "cascading" indirect taxes paid only to the extent the individual taxpayer can demonstrate by clear and convincing evidence that such taxes were actually paid. For purposes of this subsection, reference to input-output tables prepared by or for the government does not constitute sufficient proof of taxes paid.

U.S. producers are already unfairly penalized by the Congress in permitting the remission of indirect taxes, but not direct taxes, to escape the reach of the countervailing duty law. There is simply no justification to require U.S. producers to suffer at the hands of foreign producers enjoying the benefits of an excessive remission of indirect taxes. The above proposal gives domestic producers the protection long intended by Congress for at least the excessive remission of indirect taxes.

3. Authorization of Executive Branch to Renegotiate Critical Circumstances Provisions, Status of Remission of Indirect Taxes. While the U.S. accepts the provisions of any of the Codes entered into during the Tokyo Round only to the extent consistent with U.S. law [Section 3 of the Trade Agreements Act of 1979, 19 U.S.C. § 2504], correcting the deficiency of present interpretation of critical circumstances would probably best be accomplished in the context of a modification to the existing Subsidies Code.

Similarly, the crucially important issue of eliminating the trade advantage being given foreign producers because of U.S. tax law needs to be addressed urgently [see, e.g., Nevin, Doorstop for free trade, 61 Harv. Bus. Rev., # 2 at 88-95 (1983)]. While section 771(5) of the Act could be modified specifically to make the nonexcessive remission of indirect taxes countervailable, or Mr. Nevin's suggestion could be adopted imposing an excise tax, we believe the most acceptable solution to the problem from the standpoint of our trading partners would be to authorize the executive branch to obtain a modification to Article VI of GATT or, more likely, a specific exemption to the imposition of an excise tax or countervailing duty tax. While our trading partners are not likely to agree to the modification of the treatment of indirect taxes, we believe offering them the chance to agree to the modification of a blatantly discriminatory system structured to penalize the United States before taking corrective action is appropriate.

4. Modification of section 303(b)(1) and deletion of 303(b)(3) of the Act [19 U.S.C. § 1303(b)(1), (3)]. Present law precludes a critical circumstances determination for imports from countries not "under the Agreement". This seems backwards and unnecessary in light of the purpose of critical circumstances determinations. Why can a domestic industry obtain additional relief from import surges from a country that has agreed to the Subsidies Code, but not from import surges from a country that will not follow the Code? Section 303 should be amended to have the same critical circumstances provisions as in sections 703(e) and 705(a)(2). The following proposed amendment to section 303(b)(1), when coupled with the deletion of the present subsection (b)(3) to section 303 effectuates such a change:

> (b) The duty imposed under subsection (a) shall be imposed, under regulations prescribed by the administering authority (as defined in section 771(1)), in accordance with title VII of this Act (relating to the imposition of countervailing duties) except that, in the case of any imported article or merchandise which is not free of duty--
>
> (1) no determination by the United States International Trade Commission under section 703(a), 704, or 705(b) [including (b)(4)(A)] shall be required,

* * *

5. Modify sections 704(d)(1) and 734(d)(1) of the Act [19 U.S.C. §§ 1671c(d)(1), 1673c(d)(1)]. To eliminate the problems that domestic industries have had with suspension agreements being forced on them by the administering authority, we propose the following change to section 704(d)(1) and 734(d)(1) of the Act:

Sec. 704 Termination or Suspension of Investigation.--

* * *

(d) Additional Rules and Conditions.--

(1) Public interest; monitoring.-- The administering authority shall not accept an agreement under subsection (b) or (c) unless:

(A) The administering authority is satisfied that suspension of the investigation is in the public interest. A suspension agreement cannot be in the public interest if the petitioner prefers the investigation to continue and a countervailing duty order to issue. And

(B) The administering authority determines that effective monitoring of the agreement by the United States is practicable.

(A similar change is suggested for section 734(d)(1) of the Act)

The proposed modification of the two statutory provisions is premised upon the twin concepts that the suspension agreement is only preferable to a full investigation where all parties perceive that they will be benefitting from a premature termination of the investigation. If the domestic industry is willing to incur the additional expense to obtain the statutory relief to which it is entitled, the foreign government and foreign exporters cannot be heard to complain. Neither the Subsidies Code [Article 4(5), (6)] nor the Antidumping Code [Article 7] require suspension of an investigation in the presence of undertakings by the foreign government or foreign producers. These Codes merely permit such a suspension to occur.

Domestic industries have felt stampeded into having the investigations commenced in response to their petitions suspended in situations where there was little likelihood of successful monitoring, where major issues remained unresolved or where they had greater confidence in obtaining the intended statutory relief if the U.S. government was collecting the appropriate duty. The above change will resolve these concerns by requiring the administering authority to complete the investigation where that is the desire of the domestic industry complaining of injurious unfair foreign competition.

Issue # 4. Substantive and procedural problems flowing from the administration and interpretation of the "material injury" provisions of Title VII of the Act by the International Trade Commission.

As the Subcommittee is well aware, with the exception of countervailing duty investigations on dutiable merchandise from countries not a "country under the Agreement" [19 U.S.C. § 1671(b)], Title VII of the Act requires both a preliminary and final affirmative determination concerning material injury by reason of the imported merchandise under investigation before an antidumping duty or countervailing duty order can issue.

Necessarily, then, the procedures followed by the U.S. International Trade Commission ("ITC"), and the ITC's interpretation of the statutory standard are important considerations for virtually all domestic industries concerned with obtaining relief from suspected unfair trade practices by foreign competitors. American Spring Wire and Florida Wire & Cable and other domestic prestressed concrete strand producers find themselves at the present time contesting negative final ITC determinations in four separate court cases flowing from four separate negative determinations by the Commission, despite the domestic industry having filed three of the petitions simultaneously. [See Court Nos. 82-10-01355, 83-1-00101, 83-3-00371, 83-3-00455].

SCM's original antidumping petition against portable electric typewriters from Japan ended in a 3-2 negative vote by the Commission in 1975 [USITC Pub. 732 (June 1975)], followed by three years of searching for a court to hear SCM's appeal [SCM Corporation v. United States, 404 F. Supp. 124 (D.C.D.C. 1975), rev'd 549 F. 2d 812 (D.C. Cir. 1977); SCM Corporation v. United States, 80 Cust. Ct. 226, C.R.D. 78-2, 450 F. Supp. 1178 (1978)], two Court ordered remands to the Commission to reconsider its vote [C.R.D. 80-2, 487 F. Supp. 96 (1980); 2 CIT ___, Slip Op. 81-57, 519 F. Supp. 911 (July 1, 1981)] with no change in Commission outcome and a final court opinion upholding the agency's decision [4 CIT ___, Slip Op. 82-54, 544 F. Supp. 194 (July 15, 1982)].

All of our other clients on whose behalf we appear have been before the ITC or its predecessor, the Tariff Commission. The areas of concern identified below flow from the experiences of our clients in undergoing the injury investigation portion of the antidumping or countervailing duty proceeding, and the experiences of their special counsel in handling other actions before the Commission:

(a) the time period considered by the ITC in considering the presence or absence of material injury;

(b) denial of access to domestic industry counsel to confidential pricing information submitted by the importers or foreign producers [19 U.S.C. § 1677f(c)];

(c) weighing of factors in determining material injury [19 U.S.C. § 1677(7)];

(d) assessment of price suppression, depression and lost sales data [19 U.S.C. § 1677(7)(C)(ii), (iii)(I)];

(e) need for two investigations [19 U.S.C. §§ 1671b(a), 1671d(b), 1673b(a), 1673d(b)];

(f) procedure for review of remanded cases from the Court of International Trade;

(g) statutory timing of the determinations and the agency's failure to cumulate.

As in our analysis of the procedural and substantive issues flowing from the administration of the antidumping and countervailing duty provisions, the responsibility of the administering authority, I wish to emphasize on behalf of my father and myself that the views expressed herein are not intended as personal criticism of the dedicated cadre of personnel at the Commission, all of whom exhibit the same high standards of professionalism that is characteristic of their counterparts at the ITA. We have had the pleasure of working with and appearing before these men and women at the Commission over the years and respect their efforts to handle each case in a thorough and objective manner. However, the issues we have identified are problems that, as counsel for domestic industries, we have found increase the obstacles confronted by domestic industries who seek the offsetting relief from unfair trade practices that is promised by our countervailing duty and antidumping laws.

(a) The ITC's reluctance to consider economic data for periods other than calendar years unnecessarily burdens domestic petitioners and frustrates meaningful injury analysis in certain situations.

Section 771(7) of the Act [19 U.S.C. § 1677(7)] defines the statutory concept "material injury" and provides the Commission with a list of factors to consider in making its injury determination. Neither the statute, the regulations, nor the legislative history discusses, however, any particular period of time which the Commission should examine in reaching its present injury determination.

The ITC's traditional method of viewing an industry is by examining the relevant economic factors discussed in section 771(7) of the Act [19 U.S.C. § 1677(7)], including the trends in import volume and prices and trends in domestic production, shipments, capacity utilization, and other economic factors, over a span of calendar years. The General Counsel of the ITC has stated:

> There is no requirement in either the statute or the legislative history that the Commission look at any particular period of time. The Commission, therefore, can examine any relevant period of time the products are being imported into the United States to determine whether there is material injury or threat of injury.

> Further, the Commission is not required to analyze data on a quarterly basis. [Memorandum from the General Counsel, GC-F-265, August 9, 1982]

The legislative history of the Trade Agreements Act instructs the ITC, in examining threat, to "place emphasis on the rate of increase of market penetration . . . . Under certain circumstances increases should be examined over a short-time period--such as the change from quarter to quarter within a calendar year." [H. R. Rep. No. 317, 96th Cong., 1st Sess. 47-48 (1979)] The General Counsel of the ITC noted that the House Report does not discuss quarterly analysis in the context of present injury determinations and concluded that, while the Commission is free to examine quarterly, semi-annual, or any relevant data, it is not required to examine data on any particular time basis. [Memorandum from the General Counsel, GC-F-265, August 9, 1982]

It has been the traditional approach of the Commission, when analyzing data for purposes of an injury determination, to look only at calendar year data. The primary data base for the ITC's inquiry is the questionnaire prepared by the Commission staff and sent to each domestic producer and to each importer. The questionnaires have become fairly pro forma, and normally ask for data for the most recent two or three years, on a calendar year basis. The only non-calendar year data which is occasionally requested is data on the time period of an incomplete year (i.e., January through April 1982 and 1983, requested in June of 1983) or quarterly price data.

The effect of the ITC's traditional approach of analyzing data on a yearly basis is the failure, in certain cases to provide relief to a industry until it has suffered serious injury. When the ITC is unwilling to examine injury over a period other than a span of years, a domestic producer who has initiated an investigation because it has found itself being harmed in the recent past from unfairly traded imports will be denied relief until it can show negative effects on its business for a rather extended period of time.

For example, in its investigations of prestressed concrete steel wire strand from Spain, France, Brazil, and the United Kingdom, the ITC reviewed the status of a domestic industry that was "reborn" in 1981 due to the opening of several new plants and expanded capacity at existing firms flowing from the curative effects of an antidumping order issued in 1978 against prestressed concrete wire strand from Japan. Petitioners asserted that the ITC should examine the relevant data on a quarterly basis since 1981 to analyze the effects which the unfairly traded imports, which had become problematic in 1981 and 1982, had on the domestic industry following its reconstruction.

Despite the fact that data on a quarterly basis and on a twelve month, non-calendar year basis, were presented to the Commission in conjunction with those investigations, the Commission refused to review quarterly or annual, non-calendar year data, and limited its review to trends in data over the most recent calendar years, and the first several months of 1982. [See USITC Pub. Nos. 1255, 1325, and 1343] Thus, trends in the domestic industry or import data on a quarterly or semi-annual basis were not considered in the ITC's injury determination; rather, the ITC noted that there had been increases on a yearly basis in domestic production and shipments (due, of course, in large part to the new entrants into the industry, Japanese-owned U.S. corporations who built plants in the United States in the after-math of the finding of dumping against imports of strand from Japan.

While obviously the particular factual pattern discussed above is of crucial importance to the domestic strand producers who filed the strand petitions, the importance of this type of factual situation to the Subcommittee's deliberations extends far beyond these particular cases.

A loss of business or price suppression or price depression that occurs for three months or six months or nine months can limit the ability of the domestic producers to reinvest in new plant and capacity today which will reduce the industry's competitiveness against fairly traded imports in the next year or so, which in turn will reduce the likely market share held by domestic producers, and the cycle snowballs. Or a surge in unfairly traded imports in a particular quarter or six months or nine months can force domestic producers to incur significant additional debt, thus increasing their risk profile and their ability to raise additional capital in the future. In an inflationary age, stagnant profits constitute actual profit declines and signal increased risk for domestic producers who will face increased working capital requirements to standstill but no increased cash flow to satisfy the increased working capital requirements for modernization or expansion consistent with trends in domestic demand.

The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant." [19 U.S.C. § 1677(7)(A)] A loss of market share for a quarter or more, reduced profits for a quarter or more, depressed or suppressed prices for a quarter or more hardly is inconsequential harm to a domestic industry. [See, e.g., Statement of Robert W. Galvin, Chairman of the Board and Chief Executive Officer, Motorola, Inc., Before the Subcommittee on Trade of the House Ways and Means Committee on Improving U.S. Trade Remedy Laws, March 16, 1983, at 14] The failure of the Commission to date to recognize such harm needlessly subjects domestic producers to continued injury from "two of the most pernicious practices which distort international trade to the disadvantage of United States commerce." [S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979)]

(b). The ITC and the Court of International Trade unfairly handicap domestic parties by narrowly construing the statute concerning availability of confidential information under protective order.

Section 777(c)(1) of the Act [19 U.S.C. § 1677f(c)(1)] provides for limited disclosure of certain confidential information under protective order. This section has previously been reviewed in the context of section 751 annual reviews before the ITA. [Supra, at 29-32] While section 777(c)(1)(A) contains broad language as to the Commission's ability to disclose confidential information submitted by any other party under the terms of a protective order, section 777(c)(2) discusses appeals from the Commission's denial of "a request for confidential information submitted by the petitioner or an interested party in support of the petitioner concerning the domestic price or cost of production of the like product." In its regulations, the Commission has merged the language of subsections (c)(1)(A) and (c)(2), above, to limit disclosure of confidential information by the ITC to domestic price and cost of production information submitted by the petitioner or an interested party in support of the petition. [19 C.F.R. § 207.7(a); see also S. Rep. No. 249, 96th Cong., 1st Sess. 99-100 (1979)]

Under its interpretation of section 777(c), the ITC consistently releases, upon receipt of a form application for protective order, all confidential information concerning domestic prices and costs of production submitted by petitioners or other parties supporting the petition, to counsel for the foreign producers or importers of record. The ITC refuses, however, to release any confidential information submitted by the importers or foreign producers to counsel for the domestic industry. In American Spring Wire Corporation, et al. v. United States [4 CIT ___, Slip Op. 82-102, at 4 (November 16,1982)], the Court of International Trade upheld the ITC's refusal to disclose to petitioners anything but domestic price and cost of production information submitted by petitioners or other parties supporting the petition, pursuant to 19 U.S.C. § 1677f(c).

The ITC's practice reduces the ability of the domestic industry to participate meaningfully in the underlying investigation at the ITC as was envisioned in the overall statutory scheme of the Act. [See, e.g.,

S. Rep. No. 249, 96th Cong., 1st Sess. 97 (1979); 125 Cong. Rec. S10319 (daily ed. July 23, 1979)(colloquy between Senators Danforth and Ribicoff)(Mr. Danforth. ". . . is it not the intent of Congress that parties be afforded every reasonable opportunity to respond to information submitted by other parties?" Mr. Ribicoff. "Yes."); 125 Cong. Rec. H5595-96 (daily ed. July 10, 1979)(Congressman Shannon. "The amendments made by title I . . . are intended to . . . provide the affected domestic industry with a greater role in the proceedings, and to insure equitable treatment of all parties to the proceeding.")].

While the ITC has recognized the importance of an examination of the confidential pricing data in determining margins of underselling, it has limited release of such information to counsel for the importers and not granted counsel for the domestic producers confidential importer pricing data under the constraints of 19 U.S.C. § 1677f(c) and 19 C.F.R. § 207.7(a). The Commission recently stated:

> The Commission relies on information concerning price leadership and underselling in making determinations of material injury under the countervailing duty provisions of the Tariff Act. Under these circumstances, the substantial need of attorneys representing importers is implicit in these investigations. [Letter of June 14, 1982, from Kenneth R. Mason, Secretary of U.S. International Trade Commission, to Eugene L. Stewart]

The substantial need of attorneys representing domestic interests to obtain importer price information in order to review margins of underselling should also be implicit in these investigations. Due, however, to the language in the statute and the agency's regulations, the ITC believes that it is not permitted to release such information to counsel for domestic interested parties.

Additionally, the language of section 777(c), as interpreted by the Court and the agency, frustrates the creation of a full record at the administrative stage and limits the ability of the domestic producers to obtain the relief from unfair trade practices which was repeatedly mandated by Congress under the antidumping and countervailing duty statutes in a timely manner. Specifically, the inability of the domestic producers to obtain this data at the administrative level may result in negative determinations because of the inability of the domestic producers to rebut information submitted by the importers. Even if relief is ultimately obtained from judicial review (an uncertain event in light of there being a potentially incomplete record and the past record on appeals from ITC decisions), the domestic industry will have needlessly been denied the relief to which it was entitled for at least a year.

(c) The ITC improperly limits the availability of relief from injury caused by dumped or subsidized imports by placing a heavier burden of proof on domestic industry petitioners than is justified by the statutory definition of material injury.

As previously noted, section 771(7) of the Act defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant," and provides the Commission with the following instructions to follow in reaching its injury determinations:

> In making its determinations under sections 703(a), 705(b), 733(a), and 735(b), the Commission shall consider, among other factors--

> (i) the volume of imports of the merchandise which is the subject of the investigation,
>
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (iii) the impact of imports of such merchandise on domestic producers of like products.

19 U.S.C. § 1677(7)(B).

Subsection (C) provides further details on what factors the Commission is to examine in assessing the volume, price, and impact on affected industry factors.

Under the above statutory provision, the ITC exercises a very broad discretion in determining the weight which should be placed on any given factor and the detail which should be used in examining the numerous factors listed. In the exercise of this discretion, the Commission generally has placed a heavy burden on the domestic industry to come forward with evidence showing that it is suffering declines in a large number of the factors enumerated in the Act.

The effect of the current ITC practice is to provide a great deal of uncertainty as to the key factors to consider in an assessment of injury by the Commission in any particular case. Much time and expense is utilized in the examination and development of a wide body of factual information by the domestic industry, without any certainty as to which factors will be deemed critical or dispositive, or even considered, by the Commission in a given situation.

(d) The ITC unfairly limits availability of relief to domestic industries by requiring considerable specific verified examples of lost sales and price suppression to be submitted by domestic producers.

Section 771(7)(C)(ii)(II) states that, in evaluating the effect of imports of merchandise on prices, the Commission shall consider whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). Lost sales are not specifically referred to in the statute, although the statute does discuss "actual and potential decline in output, sales, and market share" of the domestic industry as an indicia of injury. [19 U.S.C. § 1677(7)(C)(iii)(I)]

In order to determine whether the unfairly traded imports have caused price depression and suppression and have taken sales from the domestic producers, the ITC requests domestic producers to provide it with specific instances of lost sales and price suppression and depression caused by the imports under investigation. These requests are made in the context of an ITC producer questionnaire.

Domestic producers are required to supply this information in great detail, including information on the quantity involved in the transaction, the price offered by the importer, the name of the customer involved, and the country from which the imported goods arrived. If the ITC staff does not receive fairly detailed information filling each of these criteria, the ITC does not consider the example further. If the staff receives what it considers to be sufficient information indicating that a sale has been lost or prices suppressed as a result of the unfairly traded merchandise, the staff attempts to verify this information by calling the customer involved. The staff then reports this information in its staff report by reviewing the number of allegations of lost sales or price suppression, the number of customers which it was able to contact, and the number of instances it was able to confirm. Additional information regarding reasons for the purchase are also often included in the staff report.

In its analysis of whether the unfairly traded imports are causing injury to a domestic industry, the Commissioners focus closely on the number of verified instances of lost sales, but only infrequently gives such specific attention to the separate issue and domestic data pertaining to price suppression. For example, if five lost sales were alleged, and three were confirmed, the ITC would exercise its discretion to determine whether these lost sales indicated injury was being caused by reason of the dumped or subsidized imports.

The effect of the ITC practice is to place a strong emphasis on requiring domestic producers to come forth with specific instances of lost sales and price suppression caused by the unfairly traded imports. If the domestic industry does not carry this "burden" of providing the data in sufficient detail to satisfy the ITC, the ITC may conclude that a major factor in its injury analysis has not been satisfied and deny relief.

American Spring Wire Corporation and Florida Wire and Cable

Company know well the problems which a domestic industry may experience when confronted by continued requests for specific examples of lost sales or price suppression transactions. In the ITC's recent investigations of prestressed concrete strand from Spain, France, Brazil and the United Kingdom, the ITC reached negative final determinations in each case. These determinations were based in part on the fact that the ITC did not find a sufficient number of verified lost sales or price suppression examples. [See USITC Pub. No. 1281, at 8-9 (August 1982) (Spain); USITC Pub. No. 1325, at 8-9 (December 1982) (France); USITC Pub. No. 1343, at 8 (February 1983) (United Kingdom);(The ITC's final determination on Brazil has not been published as of the date of this statement)]

Placing a heavy emphasis on such data puts a tremendous burden on domestic producers for a number of reasons. First, this type of data is gathered primarily from customers of the domestic producers under investigation and involves highly confidential information regarding offers or purchases from foreign producers. Often the customer is reticent to inform his domestic supplier of other purchases, particularly in the detail which the ITC requests--from what country the supply arrived, in what quantity, and at what amount. While often the domestic producers are aware that there is competition for an account, they may not be aware of all of the specifics, including who got the sale in the end. And, if an importer who deals in goods from a number of countries is involved in the competitive transaction, it is often difficult to discern which country's goods are being offered for sale--a fact sometimes not even known by the customer who may be dealing with a broker who handles foreign merchandise from a number of sources or who may handle both foreign and domestic material. [E.g., Certain Steel Products from Spain, Inv. Nos. 701-TA-155 through 163 (Preliminary), USITC Pub. 1255 at A-50 - 52 (June 1982)].

Second, even when the domestic producers have been able to obtain this data and supply it in the detail required by the ITC to justify further investigation and verification of such data, there have been additional problems associated with any verification. Importers and purchasers stand to lose a source of cheap supply when an antidumping or countervailing duty investigation is commenced. It is understandable that when asked about the reasons they buy foreign product, price often recedes to merely "one of a series" of considerations. Because of time and budgetary constraints, most ITC staff verification work is done by telephone, preventing a thorough review of purchasers' invoices and correspondence files which might provide a better guide to the factors that actually result in a sale being consumated. While quality, service and selection are generally always considerations in determining from whom one is willing to purchase, it is usually the case that all major U.S. producers and all major foreign producers offer a product of satisfactory quality in sufficient selection, while service generally favors the domestic producer. Thus, price may be the only basis of purchase and will almost always be a critical consideration in buying from an offshore supplier. But without the means to carefully review the underlying facts with each interviewee (often not practical considering budget and time limitations), the record is littered with red herrings all of which lead away from price as a major factor in buying the foreign product.

Moreover, under present statutory timetables and agency practice, petitions against more than one country,.even if commenced at one time, may result in multiple hearings, multiple requests for lost sales information and multiple contacts of major purchasers of foreign product. Such duplication of effort is very inefficient and expensive for the domestic industry and the Commission and its staff. Moreover, purchasers become more guarded in their responses through time, and, if repeatedly contacted by the ITC will create ill will between the purchaser and his U.S. suppliers and will almost certainly lead to the drying up of sources of information in the marketplace.

Finally, for industries composed of small companies (such as the rose industry), records may not normally be maintained in sufficient detail to permit the generation of the specific instances, or the producer may market through a wholesaler or selling agent who in turn is removed from the direct competition with the foreign product. A heavy focus on lost sales or price suppression information in such a situation will obviously create a major obstacle to the obtaining of needed relief from dumped or subsidized competition.

(e) The two injury investigations mandated by the statute often unnecessarily consume the ITC's and the domestic industry's resources without contributing information beyond that which the ITC could act upon with greater efficiency in a simplified procedure.

Under the relevant provisions of the antidumping and countervailing duty laws, the Commission must make two affirmative determinations with respect to material injury before an order can issue. [19 U.S.C. §§ 1671b(a), 1671d(b), 1673b(a), 1673d(b)]

Within 45 days after the date a petition is filed or an investigation commenced by the ITA pursuant to the relevant countervailing duty or antidumping duty provisions, the Commission must:

> . . . make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable indication that--
>
> "(1) an industry in the United States-
>
> "(A) is materially injured, or
>
> "(B) is threatened with material injury, or
>
> "(2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

This first determination is designed to permit U.S. law to comply with Article 2(4) of the Subsidy Code and Article 5(b) of the Antidumping Code which require consideration of whether material injury (or threat thereof) exists before the commencement of an investigation. [*E.g.*, S. Rep. No.

249, 96th Cong., 1st Sess. at 49, 66 (1979)] As witnessed by the legislative history, the standard of proof necessary to satisfy the preliminary determinations of a reasonable indication of material injury (or threat thereof) is intended to be minimal indeed. "It is the intention of the Committee that 'a reasonable indication' will exist in each case in which the facts reasonably indicate that an industry in the United States could possibly be suffering material injury, threat thereof, or material retardation." [H.R. Rep. No. 317, 96th Cong., 1st Sess. 52 (1979)]

The ITC regulations define the procedures which shall occur in a Commission preliminary determination in 19 C.F.R. § 207.15, as follows:

> Any person may submit to the Commission on or before a date specified in the notice of investigation issued pursuant to § 207.12 a written brief containing information and arguments pertinent to the subject matter of the investigation. If he deems it appropriate, the Director shall hold a conference pursuant to § 201.12(a). The conference, if any, shall be held after notice thereof is served on the parties and published in the Federal Register and shall be transcribed. Notwithstanding the foregoing, the Commission may decide to hold a hearing in lieu of the Director's holding of a conference.

In conducting preliminary investigations, the ITC submits questionnaires to all domestic producers and importers requesting data on the applicable economic factors set forth in 19 U.S.C. § 1677(7). The ITC then holds a public conference at which time representatives for the petitioner and the respondent typically appear and present testimony on the various statutory factors as well as responding to questions posed by the staff of the Commission. The ITC also accepts prepared testimony and submissions of interested parties at this stage of the proceeding, as well as post-conference briefs following the proceeding. The Commission then attempts to review these various submissions, as well as the questionnaire responses and the petition itself, in reaching a preliminary determination within the 45 day statutory time limit.

Under the current ITC practice, the Commission and the staff perform, in the short 45 day time period prescribed, a relatively detailed review of the status of the domestic industry and the potential injury which the imports under investigation may be causing. As set forth above, this review includes a number of time-consuming steps, not the least of which is the holding of a public conference and receipt and review of interested party submissions. Such procedures place a burden on both the Commission staff and on the interested parties in terms of time and expense that are not likely justified in light of the low threshold standard to be applied in making a preliminary determination.

(f) The ITC, by using its perceived broad discretion to affirm all Court remanded determinations regardless of factual or legal error found by the Court, frustrate meaningful judicial review.

A concern of any party to an administrative proceeding is what rights of judicial review does the party have if the determination of the agency is adverse to the party's interests. Section 516A of the Act [19 U.S.C. § 1516a] lays out the rights of judicial review to challenge ITC determinations believed not to be supported by substantial evidence of record.

Following standard judicial procedure when reviewing an administrative determination, it has been the predominant practice of the Court of International Trade (and its predecessor, the Customs Court), upon review of final injury determinations, to remand the case to the agency for redetermination when it finds that the "substantial evidence" test has not been met or where it decides that certain factual or legal basis of the agency's determination were erroneous. In only one instance has the Court ever reversed an ITC final determination and ordered the appropriate remedy without remanding the case to the agency. [See Alberta Gas Chemicals, Inc. v. United States, Slip Op. 81-48, 515 F. Supp. 780 (May 28, 1981) (mere possibility that injury might occur at some remote future time held not to satisfy standard for determination of the likelihood of injury to a domestic industry)]

While occasionally the Court will provide instructions to gather additional evidence in certain areas, the Court does not issue specific instructions on the procedures which the agency should utilize in reexamining its original determination. Thus, on many occasions, the redetermination of the agency is again insufficient and the Court, upon review, remands the case to the agency for a second or third redetermination. [See, e.g., Atlantic Sugar, Ltd., and Redpath Sugars, Ltd. v. United States, Slip Ops. 81-62, 519 F. Supp. 916 (July 8, 1981), 81-119 (Dec. 28, 1981), Slip Op. 82-114 (Dec. 14, 1982) (appeal of ITC final determination in Sugars and Sirups from Canada, USITC Pub. Nos. 1047 (March 1980), 1189 (October 1981), and 1243 (May 1982); SCM Corporation v. United States, C.R.D. 80-2, 487 F. Supp. 96 (1980), 2 CIT ___, Slip Op. 81-57, 519 F. Supp. 911 (July 1, 1981)]

Because no procedures have been established by law with which the Commission must comply in its reconsideration of a remanded case, the actions taken at the Commission in reviewing such a case vary. Normally, however, it appears that the ITC's redetermination of a case at the order of the Court involves primarily an attempt to supplement the agency's original decision with a fuller discussion of the factual material of record to support the original determination. A review of the cases remanded to the ITC show that there has never been a case remanded which has been decided differently by the Commission, although on occasion an isolated Commissioner has changed his or her vote.*

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* To an outside observer, the appearance is one of the Commission merely rubber-stamping its original determination, spending time only in finding enough further evidence from the record to justify its original conclusion so that the "substantial evidence" standard may be satisfied to the satisfaction of the Court.

In some cases, the agency hasn't even bothered to bolster its prior determination with additional evidence of record. For example, in the case of Voss International Corp. v. United States, 78 Cust. Ct. 130, C.D. 4698, aff'd, 67 C.C.P.A. 96, C.A.D. 1253, 628 F.2d 1328 (1980), the Court had remanded the case to the agency with instructions to reconsider the injury issue by way of a new vote. The Commission ignored these instructions, and responded by stating that it had chosen to stand by its original vote and continued to believe that its original vote was valid; thus, no new vote was taken. The Court accepted this statement. Thus, by stating that it believed its original vote was correct, the agency avoided the detailed review which should have been undertaken and even avoided a re-vote.

Chairman Eckes, in his prepared testimony to this Subcommittee on March 16, 1983 (page 6), noted "the Commission has not yet been overturned under the revised. law. Thus, it appears that the provision for extensive court review in the Trade Agreements Act of 1979 has significantly added to the costs of dumping and countervailing duty investigations without affecting the results of Commission determinations." The Chairman's did not reference the many cases that have been remanded to the agency (sometimes repeatedly) by the Court because of factual or legal errors, and the singular accomplishment of the agency in never finding it made a mistake in its original determination.

The present system of remanding cases to the ITC obviously provides the plaintiff in the action very little hope of ever obtaining the relief deemed warranted, consumes considerable time and expense on the part of whichever party deems itself aggrieved, and has had a significant negative effect on the perceived rights to judicial review granted to interested parties under section 516A of the Act.

We don't believe that it was the Congressional intent that the Commission's decisions not be subject to effective judicial review. However, the apparent grant of virtually unfettered discretion in the weighing of factors makes it difficult, if not impossible, for a reviewing Court not to find some evidence of record to support a Commission position and hence uphold the ITC's decision. Even where the Court decides that the agency has erred as a matter of law or fact, the process of remand merely provides a second (or third or fourth) opportunity for the agency to sift the record to find another basis for arriving at the same result.

> (g) The ITC has denied and limited relief to injured domestic industries by ignoring judicial precedent and the enabling intent of the Congress in refusing to cumulate the weight of concurrent unfairly traded imports from two or more countries upon the affected domestic industry.

The present structure of the countervailing duty and antidumping statutory provisions provide for different time periods in which final determinations by the ITC must be rendered when a petitioner files both antidumping and countervailing duty petitions, even if the petitions are against the same country. [See, e.g., the following sections of the

Act: 703(b)(preliminary ITA determination within 85 days of filing of a petition), 705(a)(final ITA determination within 75 days of preliminary), 705(b)(final ITC determination within 120 days after ITA preliminary or within 45 days of ITA final), 733(b)(preliminary ITA determination within 160 days of filing of petition unless verification waived, then 75 days), 735(a)(final ITA determination within 75 days of preliminary), 735(b) (final ITC determination within 120 days after ITA preliminary or within 45 days of ITA final)] The situation can become even more complicated if multiple petitions are filed at the same time under one or both laws, as some cases may be found "extraordinarily complicated" [§§ 703(c), 733(c) of the Act] or some antidumping duty investigations may be extended pursuant to section 735(a)(2) of the Act [19 U.S.C. § 1673d(a)(2)], or one or more cases may be suspended and then continued [§§ 704(b), (g), 734(b), (g) of the Act]. Other than requesting an extension in the final ITA determination of sales at less than fair value where the agency has made a preliminary negative determination, the domestic industry has no control over the timing of the investigations or the resulting need for multiple ITC injury investigations.

Such a process of different final determination dates has resulted in the ITC holding a series of hearings on cases filed by a domestic industry simultaneously, with the possible result that the collective impact of all the unfairly traded imports is not considered by the ITC. Not only is such a process very time consuming and expensive for the domestic industry and the Commission, but there is the possibility that the Commission, confronted in its first decision on the industry with only partial import data, will make an adverse determination to the domestic industry. An adverse initial determination may well doom all of the subsequent investigations as well. Such has been the agony of the domestic strand producers who have suffered through three separate final ITC hearings and a fourth submission of views only to be confronted with a series of negative determinations in which the cumulative impact of all the admittedly dumped or subsidized competition was never examined.

Moreover, even where imports from a number of countries are considered simultaneously, the Commission has been slow to find cumulation appropriate. [See, e.g., Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157, 158, 159, 160 and 162 (Final), USITC Pub. 1331 at 14-15, 36 (December 1982)] Thus, even where the product is essentially fungible and the injury investigations for the same product from different countries is held concurrently, the Commission may make different determinations with respect to dumped or subsidized imports of the same product from different countries. As stated by the Appellate Term, First Division, U.S. Customs Court in City Lumber Co. v. United States:

> [A]n investigation of imports from only one country, in disregard of the effect on the market area in question, of sales at less than fair value from other countries, would result in a study and conclusions that would be myopic and unrealistic. An investigation so limited and restricted would not help achieve the statutory remedy envisaged by the enabling legislation. It would seem clear that the mischief that the act aimed to remedy required a broad solution. Surely

> Congress did not seek to fashion a remedy to the problem of dumping "by solutions only partially effective". [64 Cust. Ct. 826, 836-37, A.R.D. 269, 311 F. Supp. 340 (1970), aff'd, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972)]

The Tariff Commission, in an opinion under the Antidumping Act, 1921, best summed up the position of domestic industries who find themselves surrounded by foreign competitors, each of whom is either engaged in price discrimination or is the recipient of government largesse:

> As the producer in this case observed, it is not possible to neatly separate the effects of French and Japanese LTFV sales, because a domestic producer subjected to unfairly priced imports from several sources is like a man assaulted by three assailants in a dark alley--he doesn't know which one cut his arm and which one put the lump on his head, all he knows is that the three combined injured him. [Aminoacetic Acid (Glycine from France, AA1921-61, TC Publication 313, at 10 (February 1970)]

Proposed Changes

1. Modify section 771(7)(A) of the Act [19 U.S.C. § 1677(7)(A)]. The problem faced by domestic industries from a failure by the agency to focus on very recent time periods can be corrected by modifying subsection (7)(A) of section 771 of the Act to read as follows:

> (7) Material Injury.--
>
> (A) In General.--The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant. Evidence of harm in a recent three month or longer period, as measured by the factors identified in subsections (7)(B) and (C) of this section, is sufficient to constitute 'material injury'.

The purpose of the unfair trade laws is to prevent injury to domestic companies from unfairly traded foreign imports of like products from occurring (threat provision) or to minimize the injury being suffered by prompt determinations of material injury and swift and vigorous enforcement during the assessment phase. The above suggested modification to section 771(7)(A) is consistent with the general purpose of the statute.

2. Modification of section 777(b), (c) of the Act [19 U.S.C. § 1677f(b), (c)]. See pages 29-32, *supra*.

3. Addition of section 771(7)(E)(iii) to the Act. Congress should amend section 771(7) to isolate the factors which demonstrate a prima facie case of injury that is more than inconsequential. Because of the adverse consequences (actual or potential) on corporate cash flow, production, employment, profits, capital investment, and cost of production flowing from a loss of market share, we would suggest that Congress define an increase of market share by dumped or subsidized imports, coupled with evidence of price undercutting, price suppression *or* price depression as constituting a rebuttable presumption of material injury. Such an approach would open up three basic approaches for a foreign producer or importer to follow in attempting to rebut the presumption: (1) domestic producers could not satisfy domestic demand; (2) domestic prices are lower than the price of imported merchandise, and if so, not because of domestic producer efforts to match foreign prices; or (3) where a short time period has been used to create the rebuttable

presumption, the import penetration figure was an aberration that is corrected by consideration of a later period.

The two proposed new subsection 771(7)(E)(iii) follow:

> (E) Special Rules.--For purposes of this paragraph--
>
> * * *
>
> (iii) Rebuttable Presumption of material injury.--Notwithstanding subsection (7)(B), (C), and (E)(ii) of this section, if the evidence of record before the Commission demonstrates that (I) imports of the products under investigation have increased as a percent of apparent domestic consumption during the period investigated and that such increase in not inconsequential, immaterial or unimportant and (II) there is evidence of price undercutting which is not inconsequential, immaterial or unimportant or of price suppression or depression, then there shall be for purposes of section 703(a), 705(b), 733(a) and 735(b) of this Act, a rebuttable presumption that the domestic industry has been materially injured by reason of the imported merchandise under investigation. For purposes of this section, the inability of domestic producers to recover their full costs of production plus a reasonable allowance for profit (at least 8%), at a time when imports being sold at less than fair value and/or benefiting from subsidies are increasing their share of apparent U.S. consumption, shall constitute proof of price suppression absent evide[illegible]nstrating that no significant quantity of [illegible] were sold at prices below domestic [illegible]s.

The justific[illegible]n fo[illegible]n addition to the injury standard is the legislative intent tha[illegible]dministered in a manner that will put an end to "two of [illegible]nicious practices which distort international trade to the disadvantage of United States commerce." [S. Rep. No. 249, 9[illegible] Cong., 1st Sess. 37 (1979); H.R. Rep. No. 317, 96th

Cong., 1st Sess. 45-46 (1979)] Moreover, as stated by Commissioner Haggart in her separate views in the Commission's determinations on Certain Carbon Steel Products from Spain (on the question of whether there need be a causal link between the net subsidy and the amount of underselling):

> "Title VII is not punitive, it is a limited remedy statute. Under the scheme [only] the amount of the advantage enjoyed [subsidy] by the imports is offset by a corresponding duty. Imports are still permitted full access to the U.S. market." 17/ Thus, the statutory scheme results in an offset of the advantage the net subsidy bestows on the imported product. To the extent the subsidy adversely affects the U.S. market, such distortive impact is negated by the countervailing duty. As a result, the statute affords protection to the domestic industry from the distortive effects of subsidization while still permitting imports of subsidized merchandise into the market.
>
> The Commission should not be required to project what effect an affirmative determination will have in the market. The statute is only designed to insure that subsidized imports which cause material injury do not compete in the U.S. market without an offsetting of the subsidy.
>
> ---
>
> 17/ Additional views of Vice-Chairman Calhoun, Certain Steel Wire Nails from the Republic of Korea, Inv. No. 701-TA-145, March 1982.
>
> [USITC Pub. 1331 at 35 (December 1982)(bracketed material in original)]

Such an addition to section 771(7)(E) of the Act would greatly simplify the injury part of the investigation, would reduce the costs of bringing an antidumping or countervailing action, and would increase the certainty that domestic producers suffering harm at the hands of foreign competitors engaged in dumping or the recipient of subsidies are provided with an environment of fair competition in which to market their products.

Moreover, the proposed modification makes clear the coverage by U.S. unfair trade laws of situations involving growth industries where domestic producers sales and profits may not show actual declines. [*See, e.g.*, Statement of Robert W. Galvin, Motorola, Inc., Before the Subcommittee on Trade, March 16, 1983, at 14] These industries often find themselves confronted with foreign competitors who are capturing all or most of the growth in a market with the aid of discriminatory pricing or large governmental infusions of funds for research, production or exportation. The dumping and subsidization may prevent U.S. growth industries from generating sufficient profits to permit the massive R & D or capital investment projects that are critical if the domestic industry is to remain at the forefront of competition.

In addition, the proposed modification reduces the problems and expense involved in domestic producers collecting and the ITC's staff attempting to verify lost sales, price suppression or price depression due to the imported merchandise, where domestic producer's profits have been reduced below an acceptable level at the same time as imports have increased their share of market.

It is our opinion that such a modification to section 771(7) of the Act would not be inconsistent with Article 6 of the Subsidies Code and Article 3 of the Antidumping Code.

4. Modification of sections 703(a) and 733(a) of the Act [19 U.S.C. §§ 1671b(a), 1673b(a)]. It is proposed that, in reaching its preliminary determination, the ITC eliminate the provisions for a conference and the submission of written comments in those situations where the evidence provided in the petition and the questionnaire responses is sufficient to provide a reasonable indication of material injury or the threat of material injury. We propose that the Chairman assign one Commissioner to each investigation who would be responsible for reviewing the data presented by the staff, including a review of the petition and questionnaire responses. Only in those instances where the Commissioner believes there is a serious question as to whether a reasonable indication of material injury exists--which should occur only rarely--should the Commission undertake the more detailed review contemplated in 19 C.F.R. § 207.15. In such unusual cases, the Commission should, upon application of the domestic industry, be permitted to extend the statutory time period for reaching its preliminary determination from 45 to 85 days to allow the staff time to develop a fuller record.

Section 703. Preliminary Determinations.

> (a) Determination by Commission of Reasonable Indication of Injury.--
>
> (1) General Standard.--Except in the case of a petition dismissed by the administering authority under section 702(c)(3), the Commission, within 45 days after the date on which a petition is filed under section 702(b) or on which it received notice from the administering authority of an investigation commenced under section 702(a), shall make a determination, based upon the best information available to it at the time

of the determination, of whether there is a reasonable indication that--

(A) an industry in the United States--
  (i) is materially injured, or
  (ii) is threaten with material injury, or
(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

(2) Normal Basis for Determination.--Normally the Commission will make its preliminary determination on the basis of the information contained in the petition and any information received by way of questionnaire response. If from a review of the petition and the questionnaire responses, the Commission believes that there is a reasonable indication of material injury within the meaning of section 771(7) of this Act, the Commission will so determine within forty-five days.

(3) Conference, Submission of Briefs, and Extension of Time for Making Preliminary Determination.--In those instances where the Commission does not believe from the information contained in the petition and from the questionnaire responses that a reasonable indication of material injury is present, the Commission shall publish notice by the fortieth day following the filing of the petition of its scheduling of a hearing, identifying the specific factual issues of concern to the Commission to be addressed at the hearing by the interested parties. Prehearing and posthearing briefs shall be permitted to be filed on a time schedule to be established by the Commission, and the Commission will publish its preliminary determination by the 85th day following filing of the petition in such a situation.

While the time frame for obtaining needed relief would be extended in those few situations where the Commission does not feel that there is a reasonable indication of material injury on the face of the petitions and questionnaire responses, the domestic industry is spared the effort and expense of going through the conferences in most situations and provided with guidance as to the issues troubling the Commission in those situations where the Commission believes further information is required to justify an affirmative preliminary determination.

5. Proposed Alternative Agency Practice on Remands. Some of the prior modifications to section 771(7) of the Act will by themselves make judicial review less likely and meritorious appeals more likely of prompt final resolution by the Court of International Trade without an endless series of remands to the agency. In addition, we propose that the Commission modify its internal procedures, to the extent necessary, to provide a "fresh" look at the information of record on a case remanded to the agency for further consideration by the Court. Commissioners and staff, just like interested parties and their counsel, understandably may feel a commitment to their initial reaction to the facts of record in a particular case. Unless procedures are followed which indicate that the underlying facts themselves are being reexamined (and augmented by further investigation where necessary), there is the possibility that the agency's reconsideration of remanded cases will project an image of mere "rubber-stamping" of prior determinations, an image that would not be in

harmony with the Commission's role of independent fact finder. The following recommendations are made with the intention of helping the Commission maintain its well-deserved reputation for professionalism and integrity.

First, we would suggest that the Commission appoint a new investigatory staff, composed of individuals not previously involved in the original investigation to review the factual underpinnings of the case in light of the Court's opinion and to reinvestigate relevant factual areas identified by the Court.

Second, where legal or factual issues found to have been relevant by the Court were not fully investigated by the Commission or briefed by the parties, an opportunity should be provided to all parties to submit additional briefs or additional written or oral evidence.

Third, the new investigatory staff should present its own "Staff Report on Remanded Issues" to the Commission for their review.

Fourth, the Commission would then vote again on the issue of injury, based on the new staff report and augmented record.

To the extent these procedures are not already followed by the Commission on remanded cases, their adoption by the ITC would increase confidence on the parts of the interested parties to the proceeding that their rights of judicial review were not a nullity and that the Commission has in fact taken a "fresh" look at the underlying administrative record before reaching its new determination.

6. Addition of section 771(7)(E)(iv) to the Act. There is no justification in making a domestic producer incur the expense of multiple hearings to consider its case that it is being materially injured by imports from a variety of countries or from both dumped and subsidized imports. Moreover, where a domestic industry has submitted information that the imported products and the domestic like product are essentially fungible products, there is no justification for not cumulating all subsidized and dumped imports that are adversely affecting the U.S. industry. The following proposal to add a subparagraph (7)(E)(iv) to section 771 of the Act addresses these very important issues:

> (7) Material Injury.--
>
> * * *
>
> (E) Special Rules.--For purposes of this paragraph--
>
> * * *
>
> (iv) Timing of Hearings and Cumulation.--
>
> (I) Timing of Hearings.--Notwithstanding the time parameters identified in sections 704(b), (g), 705(b) 734(b), (g) and 735(b) of the Act, upon the request of the domestic industry, if petitions under Subtitle A and/or Subtitle B of Title VII of the Act were filed on the same day, the Commission will conduct concurrent investigations and hold a single hearing, with the date of its final determination being fixed by the latest date for a final determination under section 705(b) or 735(b) for any individual investigation.
>
> (II) Cumulation.--For purposes of this section, if the domestic industry has submitted information demonstrating the likelihood of fungibility of foreign

> merchandise subject to different investigations, then the Commission shall cumulate the impact of all merchandise subject to present or prior investigation under Title VII of this Act to the extent such merchandise has not been subject to an antidumping or countervailing duty order for part or all of the time period being reviewed by the Commission, unless evidence is submitted which demonstrates that the merchandise is not fungible.

These recommended changes to the material injury part of the antidumping and countervailing duty laws would represent a major simplification in the process of securing swift relief from unfair trade practices engaged in by foreign competitors that confront our domestic industries in the marketplace. The proposed changes would reduce the cost of participation, reduce the burden of proof on the domestic industry petitioning the government for relief, would reduce the administrative burden at the ITC, and would safeguard domestic industry's right to relief (1) by having the agency pinpoint those areas where on a preliminary basis the agency wishes additional information to make an affirmative determination, (2) by reducing the essentially unreviewable discretion of the agency that presently exists in weighing and considering the statutorily identified criteria, and (3) by providing greater safeguards that judicial remands will meet with a "fresh" review of the underlying facts of record and the supplemental evidence submitted during the remand.

Issue # 5. Existing limitations on domestic industries' rights to judicial review.

All of our clients represented here today have had occasion to benefit from the greatly expanded rights of judicial review provided by Title X of the Trade Agreements Act of 1979. With the exception of a few situations that the Congress, we believe, did not anticipate, Title X has been a major success in permitting domestic industries (and foreign producers or importers) to challenge those aspects of the administering authority's and the Commission's decisions that were believed by the interested party not to be in accordance with the evidence of record or to be contrary to the spirit or the letter of the statute involved.

Our clients are deeply troubled, however, by the following part of the Subcommittee's Release of February 15, 1983:

> Several proposals have already been raised for Subcommittee consideration, including the following:
>
> 1. Improving administration of antidumping and countervailing duty laws to make these important remedies less complex, costly, and time consuming for all parties; e.g., simplification of calculation procedures, curtailment of interlocutory judicial review, and modification of preliminary determinations." [Emphasis added]

The recommendation for eliminating "interlocutory judicial review" [presumably referring to judicial review of those determinations identified in section 516A(a)(1) of the Act], to our knowledge was not made by domestic producers or workers or by those representing domestic producers or their employees.* Our clients strenuously oppose any reduction in the rights of judicial review presently provided by statute.

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* The one reference to the issue we have seen prior to the announced hearings was the suggestion submitted to this Subcommittee on December

A review of section 516A(a)(1) of the Act will show why such appeals, which include appeals not properly referred to as interlocutory, are of great importance to domestic industries and their employees. The section identifies five determinations from which an appeal may be taken under subsection (a)(1) of section 516A:

> (A) a determination by the Secretary or the administering authority, under section 303(a)(3), 702(c), or 732(c) of this Act, not to initiate an investigation,
>
> (B) a determination by the administering authority, under section 703(c) or 733(c) of this Act, that a case is extraordinarily complicated,
>
> (C) a determination by the administering authority, under section 751(b) of this Act, not to review an agreement or a determination based upon changed circumstances,

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(footnote continued from previous page)

16, 1981, by Noel Hemmendinger, Esq., whose prepared statement indicates that his many years of practice have been exclusively on the side of the import interests. U.S. Trade Policy, Phase II: Private Sector, Hearings Before the Subcomm. of Trade of the House Comm. on Ways and Means, 97th Cong., 1st Sess., Part A, at 638 (Serial 97-46)(1981). Our firm had an opportunity to respond to the suggestion that judicial review rights should be limited the same day during questioning by the Chairman of the Subcommittee of SCM's Consumer Products Division's President, Mr. George F. Burns. Id. at 697-98.

At the March 16, 1983 session of these hearings, Mr. Olmer of the Department of Commerce, supported limiting rights to judicial review. Statement of Lionel H. Olmer, Under Secretary of Commerce for International Trade, Before the Subcommittee on Trade, House Ways & Means Committee, March 16, 1983, at 6.

> (D) a negative determination by the Commission, under section 703(a) or 733(a) of this Act, as to whether there is a reasonable indication of material injury, threat of material injury, or material retardation, or
>
> (E) a negative determination by the administering authority under section 703(b) or 733(b) of this Act.

Subsections (A) and (D) do not refer to interlocutory determinations. When the ITA decides not to initiate an investigation, the case is over. Roses Inc. can bear painful witness to that fact. Having filed an antidumping petition on roses from Colombia on June 4, 1981, Roses Inc. was denied an investigation by the ITA (after a series of ex parte meetings with the Colombian Embassy and counsel for the Colombian growers). [46 Fed. Reg. 33575] Despite a decision by the Court of International Trade that the ITA's action was not in accordance with law and that the agency had a legal duty to commence an investigation [3 CIT ___, Slip Op. 82-29 (April 28, 1982)], the agency has refused to commence the antidumping investigation, seeking and obtaining a stay pending appeal to the Court of Appeals for the Federal Circuit. So the rose growers of the United States, small businessmen operating family owned commercial greenhouses, having twice been denied relief under section 201 of the Trade Act of 1974, have been forced to wait nearly two years before having their antidumping petition against Colombia result in an investigation! If there is too much litigation in Roses Inc.'s case, it is the result of the administering authority's refusal to abide by the decision of the Court of International Trade holding that Roses' petition was fully responsive to the statutory requirements and entitled to the initiation of an antidumping investigation forthwith. [E.g., H.R. Rep. No. 317, 96th Cong., 1st Sess. 60 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 63 (1979); 125 Cong. Rec. S 10318 (daily ed. July 23, 1979)(colloquy between Senators Danforth and Ribicoff)]

Similarly, if the Commission makes a negative determination under section 703(b) or 733(b) of the Act, the investigation for the product or for the country is terminated. For petitions which cover only one country or product, the entire proceeding will be concluded. If there are multiple products and/or countries, part of the proceeding may continue. If a party feels aggrieved by that determination, how is the remedial purpose of the statute advanced by eliminating the right of the party aggrieved to seek immediate appeal?

Subsections (a)(1)(B) and (E) were specifically referred to in the Senate floor debates of the Trade Agreements Act of 1979:

> MR. DANFORTH. With respect to judicial review and expedited appeals of interlocutory orders, my reference here is to section 1001 of the bill, which amends section 516 of the Tariff Act of 1930 by adding a new section 516A.
>
> Is it not true that Congress decision in providing for appeals from either a negative preliminary determination or a decision to extend the time for such a determination--decisions which are interlocutory in nature--is because the preliminary determination is the crucial stage in either an antidumping or countervailing duty investigation? Further, it is crucial because an affirmative preliminary determination results in suspension of liquidation of the merchandise covered by the determination.
>
> MR. RIBICOFF. Yes.

> MR. DANFORTH. Would it be correct to say that Congress decided on an expedited appeal of these interlocutory orders so as to provide a check on any abuse by the administering authority in using the extended time for a preliminary determination, except in only the rarest of cases, or issuing negative preliminary determinations so as to get more time or employing something more than a low threshold test for its preliminary determination?
>
> MR. RIBICOFF. Yes. [125 Cong. Rec. S 10319 (daily ed. July 23, 1979)]

To our knowledge no cases have been filed challenging the ITA's declaration of a determination as extraordinarily complicated. The appeals under subsection (a)(1)(E) have sought judicial correction of preliminary standards believed by the domestic petitioners to be inconsistent with the statutory standard or where resolution of a key substantive issue early (e.g., ITA decision that a program does not constitute a subsidy) will hasten the securing of the full measure of statutory relief intended by Congress.

It is the position of our clients that with two modifications, the present statutory scheme for judicial review is satisfactory at present (in light of statutory amendments previously recommended for the ITA and ITC determinations) adequately to protect domestic industry rights. The two determinations where clarification is necessary to acknowledge a domestic industry's right to seek judicial review are the following:

(a) final affirmative determinations by the administering authority;

(b) preliminary negative critical circumstances determinations by the administering authority.

(a) Clarification is needed of the right of domestic parties to secure judicial review of final affirmative determinations of the ITA where the margins of dumping or the net subsidy measurements are erroneous and too small.

The amendments to the law regarding judicial review of countervailing and antidumping duty proceedings contained in section 516A of the Act [19 U.S.C. § 1516a] were intended "to explicitly provide for judicial review of all final, and several interlocutory, determinations made by the administering authority and the ITC during an antidumping or countervailing duty proceeding." [H.R. Rep. No. 317, 96th Cong., 1st Sess. 180 (1979)(emphasis added)] The ability to challenge certain actions had been uncertain before the amendments. "For example, under present 516(c) it is not clear whether a domestic manufacturer can challenge the amount of a dumping or countervailing duty assessment or only the total failure to assess such a duty. The bill would leave no doubt that judicial reivew may be sought on either basis." [*Id.* at 180-81, emphasis in original]

The administering authority, through the Justice Department, has adopted a posture of attempting to limit a domestic industry's rights to judicial review of final affirmative determinations by the ITA both, if an action is brought prior to the issuance of the ITC final determination as premature, and if the final ITC determination is negative, arguing that the ITA's determination is irrelevant until such time as there is an antidumping or countervailing duty determination outstanding.

The present language of section 516A(a)(2) is unclear, hence providing the support that the agency has been using in Court in an effort to dismiss a wide range of appeals from dissatisfied domestic industries (no judicial decisions have yet been handed down although a number of Court appeals from final ITA determinations have been suspended pending resolution of the ITC appeals [e.g., American Spring Wire Corporation v. United States, 82-8-01068 (by Order dated March 22, 1983); American Spring Wire Corporation v. United States, 82-11-01571 (by Order dated March 22, 1983)]). Subsection (a)(2)(A) of section 516A of the Act, indicates the time in which an aggrieved party may commence an action, differentiating between the publication of notice of certain final determinations in the Federal Register and the publication of notice of an antidumping or countervailing duty order in the Federal Register. Subsection (a)(2)(B) of 516A refers in subpart (ii) to a final negative determination by the ITA, while subpart (i) (whose antecedent is the publication of an antidumping or countervailing duty order) refers to final affirmative determinations. The government's argument has been that a final affirmative determination [even if resulting in 0.5% net subsidy margins as opposed to alleged subsidy margins of 50.0% (e.g., in Prestressed Concrete Steel Wire Strand from Spain, the ITA's final affirmative determination found a net subsidy of only 1.77% ad valorem as compared to the net subsidies alleged in the petition of up to 50.5% ad valorem (47 Fed. Reg. 28723))] is not negative within the meaning of 516A(a)(2)(B)(ii) of the Act and, if followed by a negative ITC determination does not constitute two affirmative determinations or follow the issuance of an antidumping or countervailing duty order within the meaning of 516A(a)(2)(A)(ii) or (B)(i). The administering authority also opposes the invocation of the Court's jurisdiction under 28 U.S.C. § 1581(i). [See American Spring Wire Corporation v. United States, Court No. 82-11-01571, Memorandum in Support of Defendant's Motion to Dismiss (or, alternative to suspend) and Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss]

Domestic industries have thus been confronted with the need to expend considerable time and energy arguing their right to be in Court contesting adverse agency rulings while facing the spectre of being denied a judicial forum entirely if the Justice Department's theory of the law is ultimately supported by the Court. Such a result is clearly contrary to the best interests of domestic industries seeking correction of erroneous agency determinations. Under the government's theory, an adversely affected domestic industry that has an unacceptable affirmative determination from the ITA and a negative determination from the ITC may not appeal the ITA's affirmative determination until such time as the domestic industry can get a reversal of the ITC's negative determination--even though for at least one of the commissioners the size of the dumping margins or the net subsidy is an important consideration in determining whether the domestic industry is materially injured or threatened with material injury by reason of the imports of the unfairly traded foreign merchan- dise under existing law [e.g., Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157, 158, 159, 160, and 162 (Final), USITC Pub. 1331 at 41-45 (December 1982)(views of Commissioner Stern)].

Such an approach has the undesirable effect of prolonging for an additional year or two the minimum time necessary for a domestic industry to obtain the relief to which it is entitled under Title VII of the Act and of making an affirmative redetermination on any subsequent remand to the ITC that much more difficult to obtain from those commissioners who deem the size of the net subsidy or dumping margins to be relevant.

A similar problem arises where there has been a suspension agreement, a request by the domestic industry for a continuance, and a resulting final affirmative determination by the administering authority (and the Commission if appropriate) but no order is issued. For example, the PC strand manufacturers filed a petition alleging that subsidies were being bestowed on the manufacture and export of PC strand from South Africa. A suspension agreement was reached in that investigation pursuant to section 704(b) of the Act [19 U.S.C. § 1671c(b)]. 47 Fed. Reg. 22137 (May 21, 1982). The petitioners requested a continuation of the investigation pursuant to section 704(g), and considerably more information was added to the record. In addition, a summons and later a complaint were filed pursuant to section 516A(a)(2)(B)(iv) (permitting judicial review of suspension agreements). When the final determination was published [47 Fed. Reg. 33310], the petitioners filed a summons and complaint to contest the final determination, but pursuant to section 704(f)(3), the suspension agreement remained in effect, and of course no countervailing duty order was published. The government filed a motion to dismiss the second action, contending that a party cannot contest a final affirmative determination without there being a countervailing duty order.

(b) The silence of the statute clouds the right of domestic parties to secure judicial review of negative critical circumstances determinations by the ITA.

There is no specific provision under section 516A(a)(1) of the Act for appealing a negative preliminary determination on critical circumstances [19 U.S.C. §§ 1671b(e), 1673b(e)] by the ITA. While the issue of whether the Court of International Trade has jurisdiction to hear an appeal from a negative preliminary critical circumstances determination has never been finally litigated, a domestic interested party who attempted to obtain a temporary restraining order and a preliminary injunction against the liquidation of the entries that would be covered by an affirmative critical circumstances determination was turned down by the Court on the grounds, inter alia, that it seemed unlikely that the Court had jurisdiction. [Haarman & Reimer Corporation v. United States, 1 CIT 127 (1981)(TRO denied); 1 CIT 148, 509 F. Supp. 1276 (1981)(prel. inj. denied), rehrng den'd, 1 CIT 207 (1981)] It has been the position of the ITA through the Justice Department that the domestic industry has an adequate remedy at law, viz., appeal of a negative determination after the issuance of a final determination by the agency.

To domestic industries petitioning for relief from unfair trade practices, if judicial review cannot be obtained immediately upon a negative preliminary determination, the issue of critical circumstances becomes moot for all practical purposes. As stated in the Senate Report to the Trade Agreements Act of 1979, "Because the majority of entries are liquidated within 6 weeks after the date of entry, the committee intends that determinations made under 733(e) be made quickly so that retroactive suspension of liquidation can provide meaningful relief." [S. Rep. No. 249, 96th Cong., 1st Sess. 67 (1979)(emphasis added)]

Proposed Changes

The previously identified jurisdictional questions that potentially deprive domestic industries of the right to appeal from adverse ITA determinations can be corrected by amending 516A(a)(1) to add a new subsection (F) and by amending 516A(a)(2)(B)(ii) as follows:

> Sec. 516A. Judicial Review in Countervailing Duty and Antidumping Duty Proceedings.
>
> (a) Review of Determination.--
>
> (1) Review of Certain Determinations.--Within 30 days after the date of publication in the Federal Register of notice of--
>
> * * *
>
> (F) a negative determination by the administering authority, under section 703(e) or 733(e) of this Act, as to whether critical circumstances exist,
>
> * * *
>
> (2) Review of Determinations on Record.--
>
> * * *
>
> (B) Reviewable Determinations.--The determinations which may be contested under subparagraph (A) are as follows:

* * *

> (ii) Any final negative or final affirmative determination by the Secretary, the administering authority, or the Commission under section 303, 705, or 735 of this Act, whether or not the other agency determination (administering authority or Commission) is affirmative or negative.

Issue #6. Problems in obtaining relief from seriously injurious fairly traded imports.

In the Subcommittee's February 15, 1983 Release, the Subcommittee expressed an interest in views on sections 201-203 of the Trade Act of 1974, as amended by section 1106(d) of the Trade Agreements Act of 1979 [93 Stat. 312], and noted that a proposal had been received "Transforming import relief law into a truly effective adjustment statute which will promote modernization and productivity in industries chronically affected by import competition."

Two of our clients have incurred the time and expense of attempting to obtain temporary relief from fairly traded import competition under the provisions of Title II of the Trade Act of 1974. Like most other industries--whether large or small--that have attempted to obtain relief under Title II (and its predecessors), neither client ultimately obtained the relief held out by statute.

Carlisle Tire & Rubber Company filed a petition in March 1978 seeking temporary relief from the serious injury it had been suffering from increasing imports of bicycle tires and tubes. Antidumping and countervailing duty petitions were also filed against these same products from Taiwan and Korea to offset the unfair competitive advantages from subsidies and dumping flowing to the imported merchandise. The Commission in 1978 [4-1 vote] found that the domestic industry producing bicycle tires and tubes was being seriously injured, or threatened with serious injury, by imported bicycle tires and tubes within the meaning of Title II of the Trade Act of 1974. [Bicycle Tires and Tubes: Report to the President on Investigation TA-210-33 Under Section 201 of the Trade Act of 1974, USITC Pub. 910 (September 1978)] However, as in most other "escape clause" cases ending with affirmative findings of serious injury and recommendations by the International Trade Commission as to the change in customs treatment required to remedy the injury so as to permit the domestic industry to adjust to the changed conditions of competition, the Executive Branch declined to provide relief to the domestic industry. [Memorandum of October 30, 1978, for the President for the Special Representative for Trade Negotiations, 43 Fed. Reg. 50995]

Roses Inc. has twice participated in section 201 investigations by the ITC. In both cases, the ITC has determined that imports had not been a substantial cause of serious injury. [Fresh Cut Flowers: Report to the President on Investigation No. TA-201-22 Under Section 201 of the Trade Act of 1974, USITC Pub. 827 (1977); Fresh Cut Roses: Report to the President on Investigation No. TA-201-42 Under Section 201 of the Trade Act of 1974, USITC Pub. 1059 (April 1980)]

Looking at the history of the cases brought and the success of industries in actually obtaining relief,* as well as the changed world economic environment in which we find ourselves in the 1980's, our clients strongly believe that a fundamental rethinking of Title II of the Trade Act of 1974 is warranted.

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* The history of relief under the "escape clause" remedy can be briefly summarized as follows:

Between 1943 and January of 1951, twenty petitions for escape clause relief were received by the U.S. Tariff Commission, [1951 Extension of the Reciprocal Trade Agreements Act: Hearing on H.R. 1612 Before the House Comm. on Ways and Means, 82 Cong., 1st Sess. 13, 397-98 (1951)], but only one was deemed to warrant "escape clause" relief [id. at 13, 429-30].

Between the enactment of the Trade Agreements Extension Act of 1951 and the summer of 1958, 87 applications for relief under the "escape clause" provisions had been received by the Tariff Commission of which 30 were found to have suffered serious injury because of increasing imports. [104 Cong. Rec. H9,601 (daily ed. June 10, 1958)(remarks of Rep. Dawson); 104 Cong. Rec. S12,698 (daily ed. July 16, 1958)(remarks of Sen. Thurmond)] Of the thirty affirmative recommendations, seventeen were rejected by the President (including seven unanimous decisions by the Commission), three had not been acted upon, and only ten industries, mostly small industries, had received any form of assistance. [104 Cong. Rec. H9,480 (daily ed. June 9, 1958)(remarks of Rep. Davis); 104 Cong. Rec. H9,502-03 (daily ed. June 9, 1958)(remarks of Rep. Flynt, small industries receiving relief included "alike clover see, linen toweling, spring clothespins, hatters' fur, figs, women's fur-felt hats within a limited value range, and safety pins"); H9,601 (daily ed. June 10, 1958) (remarks of Rep. Dawson); 104 Cong. Rec. S12,698 (daily ed. July 16, 1958)]

Between the passage of the Trade Agreements Extension Act of 1958 and passage of the Trade Expansion Act of 1962, forty-six additional "escape clause" cases had been handled by the Tariff Commission, 11 of which resulted in "serious injury" determinations by the Commission, and only three of which resulted in affirmative action by the President. [U.S. Tariff Commission, Investigations Under the Escape Clause of Trade Agreements, TC Pub. 116 at 8-12 (between Aug. 20, 1958 and Oct. 11, 1962)].

The escape clause provision in the Trade Expansion Act of 1962 was much more restrictive in approach and resulted in only 28 cases being filed prior to the Trade Act of 1974, only three of which ended with a majority affirmative vote by the Tariff Commission (three others were evenly split). All three majority-affirmative-vote cases resulted in relief. [Twentieth Annual Report of the President of the United States on the Trade Agreements Program at 38 (1975)]

Specifically, quite a number of basic industries are in the throes of major restructuring not only in the United States, but in other industrialized nations as well, and may be beset by a wide variety of problems in addition to strong import growth. Present interpretation of Title II of the Trade Act of 1974 dooms petitions on behalf of such industries to failure if they attempt to obtain moderation of the damaging and rising flood of imports during the limited period of time needed to restructure.

Moreover, a number of foreign competitors appear to have adopted a strategy for economic expansion of targeting particular industries for

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(footnote from previous page continued)

Under the existing provisions of Title II of the Trade Act of 1974, the ITC, through the first forty-three investigations, had made affirmative determinations in twenty-four cases, been evenly divided in three cases, and found imports not to be a substantial cause of serious injury in 16 cases. [Affirmative or split ITC decisions: USITC Pub.

focus, particularly in the areas of anticipated demand growth such as high technology equipment and component parts. Such industries, of course, have been the source of considerable growth in the U.S. economy and have been held out by many as the area where U.S. concentration should be in the future. [But see March 28, 1983 Business Week, "America Rushes to High Tech for Growth," pages 84-98] If the standard of what constitutes "serious injury" is not modified by the Congress [19 U.S.C. § 2251(b)(2)], U.S. companies competing in these areas may find themselves

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(footnote from previous page continued)

Nos. 755, 756, 757, 758, 759, 761, 767, 773, 781, 798, 799, 807, 808, 826, 845, 847, 852, 884, 905, 910, 911, 917, 924, 933, 1008, 1030, 1089] However, in only nine of the twenty-seven cases in which the President could have provided relief, did the President do so in a form other than adjustment assistance. [E.g., Pres. Proc. 4801, 45 Fed. Reg. 72617 (temporary duty increase on the importation of certain mushrooms)] The President has recently provided relief to the heavy motorcycle case (Office of the United States Trade Representative, 83/13, April 1, 1983 announcing presidential action on motorcycle imports).

However, the Commission adopted a very restrictive reading of the statutory standard of "substantial cause" in the context of an economic recession in Certain Motor Vehicles and Certain Chassis and Bodies Therefore: Report to the President on Investigation TA-201-44 Under Section 201 of the Trade Act of 1974 [USITC Pub. 1110 (December 1980)]. Without a modification of the standard applied by the Commission, it is doubtful that very many domestic industries will be able to pass the existing test in the future. [E.g., Tubeless Tire Valves: Report to the President on Investigation TA-201-46 Under Section 201 of the Trade Act of 1974, USITC Pub. 1286 (September 1982)] The very unusual circumstances of the domestic heavyweight motorcycle industry--imports of more than one year's apparent consumption in inventory--are not likely to be available to supply a basis for an affirmative determination in very many other investigations. [Heavyweight Motorcycles, and Engines and Power Train Subassemblies Therefor: Report to the President on Investigation TA-201-47 Under Section 201 of the Trade Act of 1974, USITC Pub. 1342 (February 1983)] first cut-off by the targeting tactics of our foreign competitors from the expansion and market share needed to maintain the economies of scale necessary to generate the profits required to fund the technology development to yield future generations of advanced products, and then, within a couple of years find themselves unable to compete against high technology product imports from foreign producers whose technological leadership has been consistently and heavily financed by their governments' subsidy programs. Clearly, targeting problems should be addressable through our unfair trade laws. One need only reflect on the successive episodes of Japanese government subsidization of the development, expansion and technological leadership of first Japan's heavy industries, second Japan's consumer electronic product industries, and now, Japan's microchip and computer industries to realize that targeting has had and will continue to have very adverse consequences for U.S. industries. Title VII, section 301 of the Trade Act of 1974 and section 337 of the Tariff Act of 1930 should be adequate, if interpreted properly, to handle targeting of industries by foreign competitors. However, to date the administering authority and the Executive Branch have been unwilling or unable to use our unfair trade laws to prevent the massive dislocation effects of such targeting practices. [Accord, Statement of Galvin, supra, at 4-12] Moreover, it may not always be possible to identify the unfair trade practice that is being engaged in by a foreign competitor. Thus, a meaningful alternative that can provide prompt relief without the time delays associated with the investigation of unfair trade practices is needed.

Third, the inflation and currency swings that have beset most of the world's economies in recent years are unprecedented in peacetime in the last forty years. Currency swings in particular may present temporary problems for industries that if not addressed promptly by their government can result in profit erosion of industry on a wide scale, resulting in less capital investment, higher costs in raising needed capital, reductions in R & D expenditures and the general worsening of the competitive position of domestic firms vis-a-vis their foreign competitors. The consistently undervalued position of the yen vis-a-vis the dollar and the overvalued position of the dollar vis-a-vis many European currencies in the past few years are merely the most blatant examples. The lessons learned from the over-whelming pressure of a highly overvalued dollar which confronted President Nixon in 1971 have been lost in the space of a decade. Our nation is repeating the errors of the post-war years when the dollar was intentionally overvalued as a generous measure to stimulate foreign country exports to the United States. In the past few years, our monetary and fiscal policy have placed the dollar again on the pinnacle of over-valuation with consequent grave harm to our balance of trade, and the strength of our import-sensitive domestic industries.

The above referenced changes in economic reality in the 1980's, coupled with the paucity of relief under existing law strongly suggest the need in our national economic interest for a constructive rethinking of the structure of the escape clause provision under U.S. law. The very limited circumstances in which escape clause relief can be justified under Article XIX of GATT, the potential for retaliation by those countries hurt by the temporary relief action taken, the worldwide restructuring needs in basic industries and shortened economic cycles in the last seven years all suggest why other countries (but not excluding the United States) have turned to various nontariff barriers, orderly marketing arrangements or "voluntary restraint" agreements in the last ten years to gain relief from fair competition instead of pursuing "escape clause" procedures.

I start with a statement of Congressional purpose behind the escape clause contained in the Senate Report to the Trade Act of 1974:

> For many years, the Congress has required that an "escape clause" be included in each trade agreement. The rationale for the "escape clause" has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition. [S. Rep. No. 1298, 93d Cong., 2d Sess. 119 (1974)]

We believe that the purpose of the escape clause should be restated in the light of the conditions and circumstances of international trade in the modern world. The purpose of the escape clause provision should be to permit domestic industries to adjust--either temporarily or permanently--to changed economic circumstances resulting either from a reduction in tariff rates, changes in inflation and currency values, purchaser preferences, or competitive conditions. The *sine qua non* for obtaining relief should be a plan which, without government contribution, will permit the domestic industry to become competitive again (or to scale back significantly) within five-to-seven years. The relief should be subject to withdrawal upon improvement in the domestic industry's condition beyond some predetermined level in sales, earnings, and marketshare.

The relief should also be certain--that is, not subject to Presidential veto. For the certainty to be politically viable, the relief must be available without other U.S. industries being subjected to offsetting compensation to the foreign countries exporting the product which is the subject of the escape clause and preferably would be against only those countries necessary to obtain the needed relief.

We are cognizant of the concerns of the Ways and Means Committee about adopting an escape clause mechanism that permits selectivity of application, and the potential use of such a principle against U.S. high technology exports. [H.R. Rep. No. 317, 96th Cong., 1st Sess. 20 (1979)] However, we believe that in order to obtain transparency of short term, emergency tariff or quota action and a structure for monitoring the same that intrudes as little as possible into fair trade, the Congress should adopt an approach which permits selectivity of application and no retaliation both in U.S. law and as an approach to any Safeguards Code. Because of the obvious concern of abuse or excessive use of such an escape clause and U.S. compliance with GATT, the Congress would presumably wish to have the Executive Branch negotiate such a Code with these two latter provisions applicable experimentally for a five year period. The ability to escape retaliation should encourage most countries to bring their restrictions "out of the closet" and to start observing an internationally agreed upon set of procedures and principles for taking remedial action.

Our proposal for U.S. law is presented in statutory form below and requires significant changes in present sections 201-203 of the Trade Act:

> Sec. 201. Investigation by International Trade Commission.
>
> * * *
>
> (b)(1) Upon the request of the President or the Special Representative for Trade Negotiations, upon resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate, upon its own motion, or upon the filing of a petition under subsection (a)(1), the Commission shall promptly make an investigation to determine whether an article is being imported into the United States in such quantities as to be an important cause of present serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.
>
> (2) In making its determinations under paragraph (1), the Commission shall take into account all economic factors which it considers relevant, including (but not limited to)--
>
> > (A) with respect to serious injury, (i) a significant limitation of growth or a decline in domestic production or shipments (actual or relative to apparent consumption) in light of overall market trends, (ii) inadequate cash flow of a significant part of the industry to sustain sound financial structure, engage in research and development and/or make needed capital investment, (iii) significant unused capacity;

(B) with respect to threat of serious injury, effects on ability to raise capital, invest in research and development, expand capacity if imports remain constant or continue on their trends line for the next twelve months; and

(C) with respect to important cause, an increase in imports (actual or relative to domestic production, shipments, or consumption).

* * *

(4) For purposes of this section, the term "important cause" means a cause which need not be greater than, or as great as any other cause, which contributes importantly to the serious injury or threat thereof to the domestic industry.

(5) In the course of any proceeding under this subsection, the Commission (i) shall investigate efforts made by firms and workers in the industry to compete more effectively with imports; (ii) shall investigate the reasonableness of (I) present capital investment plans and programs of the domestic industry, (II) R & D programs and anticipated results within the industry, (III) level of funding required to permit capital formation needed by the industry to return to competitiveness; and (iii) shall determine the possibility of and the time necessary for shifting industry resources to other productive activities.

* * *

(d)(1) The Commission shall publish its determination under subsection (b), and the basis therefor and shall include in each report any dissenting or separate views. If the Commission finds with respect to any article, as a result of its investigation, the serious injury or threat thereof described in subsection (b), it shall find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury, identify the country or countries against whom the remedy is to be applied, and shall notify the President accordingly.

(2) The Commission shall publish its findings under subsection (b) at the earliest practicable time, but not later than 6 months after the date on which the petition is filed (or the date on which the request or resolution is received or the motion is adopted, as the case may be).

(e) The President shall within 30 days of receiving notification of the Commission's determination, issue a proclamation increasing the duty and/or imposing quotas. The proclamation will take effect 15 days after the publication of the proclamation in the Federal Register.

(f) The additional duty and/or import quota shall be based upon the remedial action needed to permit the domestic industry to relieve the market displacement and price effects of the injurious imports to a sufficient degree and for a sufficient period of time to enable the domestic industry to obtain the level of performance found by the Commission to be necessary for sustained profitable operation or to permit without impairment of the domestic industry's capital resources an orderly reallocation of the domestic industry's capital resources to the production of goods for other lines of commerce which the Commission finds do not pose the threat of serious import injury. The period for the remedial action recommended by the Commission shall ordinarily not exceed seven years after the day on which import relief with respect to the article in question first takes effect pursuant to this section.

(g) If the relief granted affects imports from selected countries only, the Commission will review at least once each year import trends, and conditions of competition in the affected domestic market, to determine whether the relief provided to the domestic industry is being impaired by increasing imports from any source. The coverage of foreign countries under the duty and quota provisions may be modified as required under this subsection.

Section 516A of the Tariff Act of 1930

Sec. 516A. Judicial Review in Countervailing Duty, Antidumping Duty and Escape Clause Proceedings.

(a) Review of Determination.--

* * *

(2) Review of Determinations on Record.--

* * *

(B) Reviewable Determinations.--The determinations which may be contested under subparagraph (A) are as follows:

* * *

(ii) Any final negative or final affirmative determination by the Secretary, the administering authority, or the Commission under section 303, 705, or 735 of this Act, whether or not the other agency determination (administering authority or Commission) is affirmative or negative; an affirmative or a negative determination by the Commission under section 202(b) of the Trade Act of 1974.

* * *

(d) Standing.--* * *. Either the petitioner, any other interested party to the proceeding, or the Special Trade Representative's Office on behalf of the President, shall have the right to bring an action in the Court of International Trade contesting the determination of the Commission under section 202(b) of the Trade Act of 1974, or to intervene as a matter of right in any such action brought by another interested party.

Conclusion

This statement has addressed the more urgent problems with the administration of our nation's unfair and fair trade laws, as such problems are perceived from the point of view of domestic industries who have actively participated in investigations initiated under those laws at both the administrative and judicial review levels. The discussion of each identified problem has been followed by a proposed solution either in the form of a statutory change or by a modification of agency regulation or practice. Adoption of the proposed changes by the Congress and the agencies would result in a profound improvement in the availability of relief from unfair trade practices with greater certainty and at less expense and greater expedition than has been true to date. In addition, the proposed change to section 201 of the Trade Act of 1974 would make available, in the appropriate circumstances, as an essential ingredient in the reindustrialization of the affected sector of our national economy, temporary relief from fairly traded but seriously injurious imports.

On behalf of the domestic companies on whose behalf our firm appears today, I request that the Subcommittee give close attention to the problems identified in this prepared testimony. The administrative policies and practices which constitute some of those problems have had the effect of decimating the relief which Congress intended be applied as the means to offset the unfair competition by imports in the U. S. market based upon internationally condemned price discrimination, or based upon foreign government intervention in competition in the American market through the conferring of economic benefits on foreign producers/exporters which gives their products an unfair competitive advantage against domestic products in this market.

Some of the problems which I have identified and discussed with you deny domestic industries that degree of meaningful participation in the proceedings before the administering authority and/or the Commission which this Committee and the Congress were at pains to make the cornerstone of the reform of the antidumping and countervailing duty laws in the '79 Act. Still others unnecessarily complicate the investigations, wasting the agencies' resources, imposing excessive costs on domestic industry participants, and unacceptably delaying the delivery of the relief intended by the Congress.

If we can be of further assistance in the Subcommittee's deliberations, or to your staff in its technical evaluation of our testimony and recommendations, our firm would be pleased to do so.

Exhibit 1

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May 10, 1982

Mr. Gary N. Horlick
Deputy Assistant Secretary for
Import Administration
U.S. Department of Commerce
Room 3099B
Washington, D.C. 20230

Dear Mr. Horlick:

Re: Written Presentation of Views on the Treatment of Certain Possible Subsidy Practices Under the Countervailing Duty Law for May 10th Conference [47 Fed. Reg. 16665].

This brief is being submitted in accordance with the ITA's notice in the Federal Register on April 19, 1982 [47 Fed. Reg. 16665] on behalf of American Spring Wire Corporation, Armco Inc., Bethlehem Steel Corporation, Carlisle Tire and Rubber Company, Florida Wire and Cable Co., Pan American Ropes, Inc., PPG Industries, Inc., Roses Inc., and Shinko Wire America, Inc., domestic companies that are petitioners in one or more countervailing duty proceedings. We address the two issues identified by the ITA in its notice in the order scheduled for review at the Conference.

1. The bestowal of benefits to manufacturers or producers of inputs into the merchandise under investigation.

In at least one case with which we are familiar, the ITA has tentatively used the following steps in determining whether capital grants, preferential loans, loan guarantees and other assistance provided to producers of inputs to the product under investigation are countervailable:

(a) the ITA determines whether or not the supplying company is owned by (or owns) the purchaser;

(b) if the answer is affirmative, the agency determines whether the assistance provided to the supplier is a subsidy and presumes that the benefit "flows through" to the purchaser;

(c) if the answer is negative, the agency presumes that no benefit "flows through" to the purchaser and hence no analysis of the underlying program is required.

We believe that such an approach, if in fact currently being considered by the agency, is not consistent with the statutory purpose of the countervailing duty law and is unsupported by economic analysis. Rather, the agency needs to reach a position based upon a consideration of the following five questions: (1) does the language "directly or indirectly" in sections 701(a)(1) and 771(5)(B) of the Tariff Act of 1930 ["the Act"] enable the ITA to find that payments to suppliers constitute countervailable subsidies; (2) should there be a distinction between related party suppliers and non-related party suppliers; (3) who has the burden of proof that a benefit has been conferred; (4) how should the ITA quantify the benefit conferred; and (5) can a benefit be conferred where the resulting price of the input is at or above prevailing world prices. As our analysis of the five questions demonstrates, the ITA's policy should be to assume that in all situations a benefit has been indirectly received by the producer of the product under investigation.

(A) Does the language "directly or indirectly" in sections 701(a)(1) and 771(5)(B) of the Tariff Act of 1930 ["the Act"] enable the ITA to find that payments to suppliers constitute countervailable subsidies?

The initial inquiry that the agency must make is whether the statutory plan of Subtitle A of Title VII of the Tariff Act of 1930 ["the Act"] permits, under any circumstances, payments to suppliers to constitute a countervailable action. Sections 701(a)(1) and 771(5)(B) of the Act, and the underlying legislative history of these sections and section 303 of the Act, indicate that such payments clearly constitute "subsidies" or "bounties or grants".

Section 701(a)(1) of the Act uses very broad language in describing the reach of the countervailing duty law, looking at whether subsidies are given directly or indirectly:

> If (1) the administering authority determines that--
> (A) a country under the Agreement, or
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,
> is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States * * *

[Emphasis added].

The term subsidy is defined in section 771(5) of the Act, which states in relevant part:

> The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this Act, and includes, but is not limited to, the following:
>
> * * *
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
>
> (ii) The provision of goods or services at preferential rates.
>
> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

[Emphasis added]

The statutory language on its face makes clear that all indirect benefits on the manufacture of the merchandise under investigation can be reached by the statute. The legislative history of the terms concerned further demonstrates that Congress intended to pursue an expansive definition of the term subsidy and hence the scope of the term "indirect". For example, the Senate Report to the Trade Agreements Act of 1979 states that

> The reference to specific subsidies in the definition is not all inclusive, but rather is illustrative of practices which are subsidies within the meaning of the word as used in the bill. The administering authority may expand upon the list of specified subsidies consistent with the basic definition. As under current law, both export and domestic subsidies are subject to countervailing duties, and a subsidy may be provided either by a government or governmental entity, subdivision, or customs union, or by a private party or group of private parties.

S. Rep. No. 96-249, 96th Cong., 1st Sess. at 85 (1979).

Similarly, the House report states that

> Regarding non-export subsidies, subparagraph (B) of section 771(5) enumerates specific domestic practices which will constitute a subsidy if provided or required by government action to a specific enterprise or industry, publicly or privately owned, paid or bestowed, directly or indirectly, with respect to the manufacture, production or export of any class or kind of merchandise. The Committee does not intend for this to be a comprehensive, exclusive enumeration of domestic practices which will be considered subsidies. It is a minimum list, an identification, for purposes of clarification, of those practices which are definitely subsidies. In deciding whether any other practice is a subsidy, the standard remains that presently used with regard to a "bounty or grant" under section 303. However, to the extent the enumerations under this provision might provide a basis for expanding the present standard consistent with the underlying principles implicit in these enumerations, then the standard shall be so altered.
>
> The Committee expects that as new practices become internationally recognized, the Authority will, by regulation, augment the enumerations under subparagraphs (A) and (B) of subsection (5).

H.R. Rep. No. 96-317, 96th Cong., 1st Sess. at 74 (1979).

There was additional lengthy discussion of the meaning of the term "subsidy" in the floor debates of the Senate between Senator Heinz and the floor leader, Senator Ribicoff:

> MR. HEINZ. In addition, however, the committee included in its subsidy definition four types of domestic subsidies: * * *.
>
> This list is intended to define as subsidies some of the more egregious practices of our trading partners and to include, among others, the practices and objectives listed in article 11 of the Subsidies Code.
>
> *The point of this language and these examples*, Mr. President, *is to define subsidy broadly so as to catch within the scope of our law as many unfair trading practices as we can*. That, of course, does not mean we countervail, because injury must also be found. *It was the committee's intent, however, that the Treasury Department, or whatever administering authority ends up with this new law, not resolve petitions by arbitrarily concluding that various practices are not subsidies*. Better to define the term broadly, as it ought to be defined, and then use the injury test as it is intended to be used.")
>
> Can the managers of the bill confirm for me these comments on the definition of subsidy?
>
> MR. RIBICOFF. May I respond that I can confirm the Senator's comments, and the Senator is correct.

125 Cong. Rec. S10,313 (daily ed. July 23, 1979)(emphasis added).

Such an expansive reading is consistent with the case law that has developed around section 303 of the Act.* The earliest cases to interpret the language of the predecessor statute to section 303 made clear that the statute was broad and all encompassing. In one of the very first cases construing U.S. countervailing duty law, Downs v. United States, 113 Fed. 114, 147 (4th Cir. 1902), aff'd, 187 U.S. 496 (1903), the Fourth Circuit discussed the terms "bounty or grant":

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* As stated in the *Zenith* case,

> [T]he current version of § 303 is in all relevant respects unchanged from the countervailing-duty statute enacted by Congress in 1897,[8] * * *
>
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>
> [8] Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205, provided in full:

> The word "bounty," in its ordinary signification, may be defined to be "an additional benefit conferred upon, or a compensation paid to, a class of persons." 1 Bouv. Law. Dict. (Ed. 1897) p. 260.
>
> * * *
>
> It is important to observe, in the consideration of this subject, that section 5 of the tariff act of 1897, under which this case arises, does not use the word "bounty" in any narrow or technical meaning. It embraces "any bounty or grant" bestowed or conferred by the Government, whether directly or indirectly. The word "grant" is more comprehensive than the term "bounty". It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons.

In a subsequent case, Nicholas v. United States, 249 U.S. 34 (1919), the brief for the United States focused on the expansive intent of Congress as evidenced

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(footnote continued)

> "That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant * * * there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. * * *"
>
> The current version of § 303 represents the fifth re-enactment of the 1897 provision without any changes reelvant here. Tariff Act of 1909, §6, 36 Stat. 85; Tariff Act of 1913, §IV(E), 38 Stat 193; Tariff Act of 1922, §303, 42 Stat 935; Tariff Act of 1930, §303, 46 Stat 687; Trade Act of 1974, §331(a), 88 Stat 2049.

Zenith Radio Corp. v. United States, 437 U.S. 443, 448, 57 L. Ed. 2d 337 at 341-42, 98 S. Ct. 2441 (1978).

by its selection of words with broad, all encompassing definitions:

> Section 5 of the tariff act of 1897 (30 Stat. 151, 205) broadened the countervailing duty provision. Therein Congress used the additional verb "bestow" and the additional noun "grant," *thus manifesting a purpose to make the provision broad and all-inclusive. The purpose of Congress to cover everything in the nature of a bounty or grant is expressed in the language* "shall pay or bestow, directly or indirectly, any bounty or grant," and again, "however the same be paid or bestowed." (at 35) (emphasis added)

The Customs Court concurred with the Government's view that the statute was broad and all encompassing, stating that the unequivocal purpose of the statute is to offset any aid or any advantage to exporters of goods, regardless of whatever name or in whatever manner or form or for whatever purpose it was given.

> The fact that the payment made by the foreign government was estimated or calculated upon a certain basis or in consideration of extra burdens imposed by domestic excise laws, or for any other reason of domestic government or policy commending itself to the wisdom of Parliament, is not controlling with our courts. The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less. The Supreme Court in Allen v. Smith (173 U.S., 389, 402) has concisely characterized bounties and their origin, saying:
>
> > Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized.
>
> . . . .
>
> And, it matters not, nor is it made by Congress an exception thereto, that it is an incidental, indirect, or *unintended* result of the British Government's endeavoring to in part repay or compensate its manufacturers and distillers for a burdensome excise system. *The courts are concerned with results and not intentions*.

7 Ct. Cust. App. 97, 107, aff'd, 249 U.S. 34 (1919)(last emphasis added). The Supreme Court's result orientation was reemphasized by the Customs Court in Energetic Worsted Corp. v. United States: "[W]henever the result is a bounty to any particular article, the statute requires that countervailing duties be imposed." 224 F. Supp. 606, 614 (Cust. Ct. 1963)(emphasis added). Accord ASG Industries, Inc. v. United States, 82 Cust. Ct. 101, 137, C.D. 4794, 467 F. Supp. 1200 (1979) ["The purpose of the law is to prevent unequal competition in our markets--to prevent foreign goods from competing with domestic goods at a lower price than they would be sold."].

Later cases to review this statutory language broadened further the liberal reading applied by the Nicholas court and focused on whether any benefit was received in connection with manufacturing or producing the subject merchandise. As the court in ASG Industries, Inc. v. United States, noted: "whether the reduction in cost is occasioned by direct cash payments, or by an act of government reducing labor cost, capital cost, or the cost of any other factor of production is of no consequence." 82 Cust. Ct. 101, 114, C.D. 4794 (1979). If a benefit is provided on the manufacture or production, regardless of the manner the government uses to provide that benefit, it is countervailable.

The Court of Customs and Patent Appeals in 1980 specifically pointed out that the administering authority could not interpret the terms "bounty or grant" narrowly to avoid imposing countervailing duties.

> To permit the Secretary to place a narrow or restricted interpretation on "bounty" or "grant" as a basis for a negative countervailing duty determination would clearly frustrate the Congressional purpose of "assuring effective protection of domestic interests from foreign subsidies . . ." [S. Rep. No. 1298, 93d Cong., 2d Sess. at 183 (1974)] Further, it would be inconsistent with the broad

> meaning of "grant" long ago established by the Supreme Court in Nicholas & Co. v. United States, supra 249 U.S. at 39, 39 S. Ct. at 220:
>
> > If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another.

ASG Industries, Inc. v. United States, 82 C.C.P.A. 101, 610 F.2d 771, 776 (1980)(bracketed material added).

Continued repetition of the words "directly *or* indirectly" and "bounty or grant" in sections 303 and 771(5) of the statute* and in the legislative history of the Act, cannot be ignored. As the Supreme Court in the *Nicholas* case stated: "Every new statute is individual and presents its own problem. That before us does, and, as we have said, *looking at its words alone, has no uncertainty of purpose*." 249 U.S. at 38-39.

The legislative history and prior judicial decisions construing the U.S. countervailing duty laws reveal an understanding that the reach of the terms "subsidy" or "bounty" or "grant" was intended to be broad. The phrase "directly or indirectly" clearly is intended to permit the reach to be as comprehensive as possible. Accordingly, the ITA should determine that the reach of sections 701(a)(1) and 771(5)(B) includes payments made to suppliers of inputs to the product under investigation.

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* The Subsidies Code similarly refers to indirect benefits as providing countervailable subsidies: "The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed *directly or indirectly* upon the manufacture, production or exportation of any merchandise, as provided for in Article VI:3 of the General Agreement." Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, *reprinted in* H. Doc. No. 96-153, Part I, 96th Cong., 1st Sess. 259, 261, Art. I, n.2 (1979)(emphasis added).

(B) Should there be a distinction between related party suppliers and non-related party suppliers?

We submit that there is no basis for distinguishing between related and unrelated supplier situations in determining whether "assistance" granted is countervailable. In related-party transactions, the ITA apparently has no difficulties in viewing the producer of the product under investigation as having received a benefit from its related supplier. However, in at least one case, the ITA has tentatively decided that no subsidy is granted where the provision of funds is to an unrelated supplier. The rationale behind the ITA's "company relationship" test has been reported by an ITA economist as being that it is not economically sound for one company to pass on benefits received to an unrelated company. This conclusion is supposedly based on "general principles of economics."

We would suggest that there is no justification for such a position by the ITA. If a supplier receives benefits from the government, such benefits will be passed through to the purchaser in one of a number of ways, in the present or in the future. For example, by lowering its price the supplier may be able to garner a larger share of the market and increase its profitability both from the fact that the supplier's per unit profit has not decreased and through increased unit sales. Since the increased profitability will reduce the need for outside financing or will increase the attractiveness of the supplier's stock, a second benefit to the supplier that will be passed on to the purchaser from the original benefit is the likelihood of lower priced supplies in the future. Other benefits to the purchaser flow from greater overall world supply (putting pressure on all prices) and wider choice of supply.

Similarly, if the supplier passes part of the benefit directly through to the purchaser and keeps part of the benefit internalized as greater per unit profits, the supplier reaps both higher potential sales, greater profit per unit of sale and increased capital to be used either for capital investments or the reduction of debt or disbursement to shareholders. Such increased profitability improves the supplier's risk profile, reduces the need to borrow funds, and results in lower costs of production--all of which enable the supplier to improve its pricing to the purchaser in the immediate future.

In addition to the obvious economic incentives to pass the benefits along to the purchaser, where one is purchasing from a state owned or controlled corporation, there can be political or national reasons (e.g., employment, export promotion) for flowing the benefits through to the purchasers.

Thus, through lower immediate prices or through becoming more efficient producers, the benefits conferred on suppliers logically benefit the purchasers in all or nearly all situations. Since a benefit has been conferred, directly or indirectly, upon the manufacture of the item under investigation, the ITA should find that "assistance" to the supplier constitutes a countervailable subsidy within the meaning of Subtitle A of Title VII of the Act.

(C) Who has the burden of proof that a benefit has been conferred?

The apparent tentative approach of the ITA to supplier benefits can be stated as follows: in related party transactions there is a presumption that such benefits flow through to the purchaser; in unrelated party transactions, there is a presumption that no benefits flow through to the purchaser. In both situations, the presumption does not seem to be rebuttable. Even if the latter presumption were rebuttable, the impact of such a regulatory scheme is to place an insurmountable burden of proof on the domestic petitioners in contravention of the statutory scheme and in frustration of the congressional mandate to vigorously enforce the law.

The statutory scheme envisioned the petitioners having a low burden of proof to get an investigation initiated. Specifically, the Senate Report directed that "the authority could not refuse to commence a proceeding merely because of conjecture that the practice is not a subsidy." S. Rep. No. 96-249, 96th Cong., 1st Sess. at 47 (1979); see also H.R. Rep. No. 96-317, 96th Cong., 1st Sess. at 51 (1979). Moreover, because the proceeding is an investigation instead of an adjudication, the power to investigate is lodged exclusively with the administering authority. Hence, there are no rights of cross-examination and only limited rights of discovery are available to the petitioners. See, e.g., The Budd Co., Railway Division v. United States, 1 CIT ____, Slip Op. 80-15, 507 F. Supp. 997 (1980); 19 U.S.C. § 1677f; S. Rep. No. 96-249 at 100.

Yet by apparently creating a presumption (whether rebuttable or not) that benefits given to unrelated suppliers do not aid the purchaser, the ITA has violated the legislative intent by eliminating any investigation of programs it deems not to be subsidies and/or shifting the burden of investigation onto the shoulders of the domestic petitioners (despite the fact that petitioners have no access to the underlying relevant facts and no discovery tools). Because such an approach violates the intent of Congress and the judicial interpretations previously referenced, the administering authority should select another standard that will better approximate the intent of Congress.

For the reasons identified in the previous section, we believe that in all (or nearly all) situations it can be demonstrated that a benefit flows to a purchaser when his unrelated supplier receives assistance from the government. Accordingly, the ITA should presume that there is a countervailable benefit conferred upon the purchaser, and that such a presumption is not rebuttable. The ITA's inquiry should be solely whether a subsidy has been provided on an input; if a subsidy has been so provided, it should be presumed that the final product is subsidized as well. The administrative difficulties in weighing the competing arguments under the tight statutory timetable suggest that any other arrangement is unworkable.

(D) How should the ITA quantify the benefit conferred?

The nature of the benefit conferred upon the supplier can, of course, be as varied as the benefits conferred directly upon the producer of the merchandise under consideration (e.g., preferential rate loans, capital grants, loan guarantees). The proper methodology for measuring capital grants is reviewed in greater detail in the analysis of the second issue ("equity" infusions into companies by governments, see infra at 19 to 23). In general, all benefits need to be examined from the point of view of value received by the producer (or exporter) of the product under investigation. As stated by the Court of International Trade in the Michelin case, "The law is not concerned with the sacrifice made by the party supplying a financial resource but rather with the benefit experienced by the recipient." Michelin Tire Corporation v. United States, 1 CIT __, Slip Op. 81-94 at 14 (1981). See also H.R. Rep. No. 317, 96th Cong., 1st Sess. at 74-75; S. Rep. No. 249, 96th Cong., 1st Sess. at 85-86. Where the recipient of the direct subsidy is a supplier, the analysis in part (B) supra, demonstrates that the value of the benefit likely being conferred upon the purchaser is at a minimum the value of the subsidy to the supplier. Accordingly, the ITA should determine the value of indirect subsidies to be the full value of such benefits to the supplier.

(E) Can a benefit be conferred where the resulting price of the input is at or above prevailing world prices?

In certain cases currently before the administering authority, one or more indirect subsidies permit the supplier to provide an input at a price that is allegedly no lower than the prevailing world market prices. A question arises as to whether such indirect subsidies can be considered to "benefit" unrelated purchasers. The answer, in our opinion, is clearly "yes".* For example, but for the various subsidies paid to the EC coal producers, few if any of the coalfields in Western Europe could have operated in the last five years. The provision of subsidies to the coal producers has the effect of (1) dramatically increasing free world production of coal (which reduces the price at which coal from non-EC sources would otherwise be available), (2) permitting EC steel producers to buy coal from a local supplier, thus reducing inventory needs, working capital needs, and (in certain instances) exchange rate risks, and (3) providing greater selection of suppliers. All of these benefits flow to the unrelated EC steel producers by reason of the provision of the subsidy to the supplier. We believe that a fair approximation of the value received by the purchaser from such supplier subsidies is the value of the subsidy to the supplier.

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* This conclusion is supported by the following language in the Senate Finance Report:

> Subsidies are bounties or grants bestowed (usually by governments) on the production, manufacture, or export of products, often with the effect of providing some competitive advantage in relation to products of another country.

S. Rep. No. 249, 96th Cong., 1st Sess. at 37 (1979)(emphasis added).

(F) Conclusion

For the reasons outlined in subparts (A) through (E) above, we submit that the administering authority should adopt a policy of treating all subsidies to suppliers as indirect subsidies to purchasers of the merchandise under investigation.

2. Government equity participation in a manufacturer or producer of the merchandise under investigation.

The Federal Register notice of April 19th identifies a second issue on which the administering authority is seeking views at the May 10th conference: whether, or under what (if any) circumstances, government equity participation in a manufacturer or producer of the merchandise under investigation should be considered a subsidy for purposes of the countervailing duty law.

While some of the major cases presently before the administering authority (e.g., the various steel and steel-related cases) offer factual settings suggesting that all government equity participation should be deemed to be a subsidy under Title VII of the Act, we believe that a per se subsidy rule with respect to government equity participation in a company or industry is not appropriate. It is unlikely, for example, that the Mexican government's investment in the petroleum industry should be deemed to be a "bounty or grant" within the meaning of the countervailing duty law. Section 771(5)(B)(i) and (iii) of the Act is a statutory effort to include within the reach of U.S. countervailing duty rates the provision of funds on a non-commercially reasonable basis. Where a state-owned company or industry is generating a commercially acceptable return on investment, we do not believe that the state's purchase of partial or total ownership is actionable without additional information indicating that because of the government's ownership the company or industry was able to obtain loans at lower interest rates than a non-state owned company of comparable size and profitability [on a presumed lower risk to lender rationale].

On the other hand, it is equally as apparent that the mere issuance of paper stock to the government by a company unable to attract funds in the financial marketplace cannot be permitted by the administering authority to eliminate the subsidy aspect of the provision of capital on a non-commercially reasonable basis [19 U.S.C. § 1677(5)(B)(i)]. As previously quoted from the ASG Industries opinion of the CCPA:

> To permit the Secretary to place a narrow or restricted interpretation on "bounty" or "grant" as a basis for a negative countervailing duty determination would clearly frustrate the Congressional purpose of "assuring effective protection of domestic interests from foreign subsidies...."

ASG Industries, Inc. v. United States, 82 C.C.P.A. 101, 610 F. 2d 771, 776 (1980), quoting S. Rep. No. 93-1298, 93d Cong., 2d Sess. 183 (1974). Clearly, Congress has continued to be concerned that domestic industries be protected from competitors that are partially relieved of the market realities. For example, as stated in the House Report:

> Congress has long been concerned that the administration of the unfair trade practice laws has not effectuated its intention to prevent such unfair trade practices from placing domestic producers in jeopardy. Through the changes in present law made by this Title, the Committee reaffirms its intention that these unfair trade statutes be administered in a manner that will prevent such practices.

H.R. Rep. No. 96-317 at 45-46.

Similarly, the Senate Report, in discussing the Subsidies Code, stated that—

> The committee believes these features of the Subsidies Agreement are a positive step in the effort to achieve discipline over subsidy practices, but *much will depend on vigorous enforcement and willingness of the parties to observe their letter and spirit*. *Ambiguities and opportunities to justify circumvention remain in the new rules*. If the United States does not press hard for enforcement, or if the international community, particularly the dispute settlement body, chooses to read the basic rules narrowly and the qualifications and exceptions broadly, then U.S. commerce will gain little.
>
> *The administration has promised to seek vigorous enforcement, and the provisions of Title IX, as well as Title I, of the bill are intended to help assure such enforcement when affected private citizens complain of foreign violations*. The committee intends to monitor these rules, and their international application, very closely.

S. Rep. No. 96-249 at 42 (emphasis added).

Accordingly, we propose the following methodology for consideration by the administering authority in determining whether and to what degree infusions of capital into a company by the state (or at the direction of the state) constitutes a subsidy within the meaning of Title VII of the Act:

—(1) the agency needs to evaluate *each* infusion of funds by a foreign government independently;

—(2) the agency should determine whether or not the infusion of funds for "equity" (shares of stock) occurs in the context of a company that in the last several years before the infusion (e.g., three years) has been profitable or that has lost money;

—(a) the agency should presume that all "investments" into loss-making operations constitute a subsidy;

--(i) if the government owns (directly or indirectly) less than 100% of the company concerned, the value of the subsidy can be conservatively estimated by taking the face amount of the "investment", subtracting the liquidation [or net book] value of the proportionate share of the company "purchased" and treating the balance as the provision of a capital grant [measurement of a capital grant is discussed below];

--(ii) if the government owns 100% of the company concerned, any additional infusion of funds would be deemed to be a capital grant;

--(b) if the infusion of funds is into a company that has been profitable, the agency should determine if the percentage of ownership secured by the government is consistent with the level of infusion of funds [examination of stock price levels if a publicly owned company; percentage of equity if a privately owned company]:

--(i) if the ownership level is consistent, the administering authority should find there to be no "subsidy" within the meaning of Title VII (unless the surrounding circumstances indicate that such equity funding would not have been available to a similarly situated company without significant dilution of stock values, in which case the estimated ownership position foregone should be deemed by the administering authority to constitute a capital grant);

--(ii) if the ownership level is not consistent with the percentage of equity, the difference should be deemed by the administering authority to constitute a capital grant.

The above methodology creates a presumption of subsidy in those situations where the profit experience of the enterprise or industry under investigation demonstrates a history of losses—exactly the type of situation where companies would have great difficulty raising equity financing. Moreover, the methodology permits the administering authority to capture that portion of the equity investment by foreign governments into profitable enterprises that do not comport with normal commercial considerations (e.g., overpaying for the value of the stock). Most importantly, such a methodology is consistent with the Congressional intent that our unfair trade laws be vigorously enforced.

A major component in the above methodology is the proper valuation of the amount of equity financing found to be a subsidy. The infusion of funds by a foreign government (or at the direction of a foreign government) where there is no requirement for repayment and no provision for interest relieve the recipient of the need to obtain the same amount of funds in the marketplace —either through the issuance of additional equity or through the obtaining of additional debt financing.* As stated in a prehearing brief submitted on behalf of PPG Industries, Inc. in a current section 751 review:

> The provision of funds to an applicant through a government grant relieves the applicant from having to seek additional financing in the equity and/or debt market. An organization looking to make an investment will usually consider the cost of its capital** in determining whether or

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* Several domestic producers have argued that a proper measure of the value received by the provision of a particular capital grant is the residual value of the asset. See, e.g., Roses Inc. Prehearing Brief, Fresh Cut Roses from Israel, July 8, 1980 at 10-12; Prehearing Statement of PPG Industries, Inc. Relating to Revised Preliminary Results As Published in 47 Fed. Reg. 6310 (February 11, 1982), April 9, 1982, at 10 [Float Glass from Belgium].

** The term "cost of capital" has been defined as follows:

> The cost of capital of a firm may be defined as a weighted average of the cost of each type of capital. The weight for each type of capital is the ratio of the market

> not to proceed with a particular investment program. "The reason is obvious: unless a business can earn on an investment at least what it costs to raise the necessary capital, there is no profit and no justification for making the investment. This is indisputable." G. Donaldson, Strategic hurdle rates for capital investment, Harvard Business Review, March-April 1972, reprinted in Finance: Part V [a Harvard Business Review reprint series] at 146 (Gordon Donaldson is the Willard Prescott Smith Professor of Corporate Finance at the Harvard Business School).

Prehearing Brief of PPG Industries, Float Glass from Belgium (8/27/81) at 15. Moreover, as the countervailing duty law is focused upon the value of the benefit to the recipient, not the cost of the benefit to the foreign government, necessarily the administering authority must examine the recipient's financial condition at the time of the subsidy to determine the value of the funds to the recipient. Size of the recipient, profitability, bond rating,*

(footnote continued from previous page)

> value of the securities representing that source of capital to the market value of all securities issued by the company. The term security includes common and preferred stocks and all interest-bearing liabilities, including notes payable.

H. Bierman, Jr., & S. Smidt, The Capital Budgeting Decision: Economic Analysis of Investment Projects 252 (5th ed. 1980)(emphasis in original).

* Moody's Investors Service has nine grades of investment quality for bonds that it rates: Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C. The definitions of several of these gradations follows:

> Aaa "Bonds which are rated Aaa are judged to be of the best quality. They carry the smallest degree of investment risk and are generally referred to as "gilt edge." Interest payments are protected by a large or by an exceptionally stable margin and principal is secure. While the various protective elements are likely to change, such changes as can be visualized are most unlikely to impair the fundamentally strong position of such issues."

> Baa "Bonds which are rated Baa are considered as medium grade obligations, i.e., they are neither highly protected nor poorly secured. Interest payments and principal security appear adequate

present economic outlook for the particular industry and amount of funds needed to be raised are all important elements in determining the value of the funds received at a particular point in time by a particular company.

A particularly difficult valuation problem is confronted where the

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for the present but certain protective elements may be lacking or may be characteristically unreliable over any great length of time. Such bonds lack outstanding investment characteristics and in fact have speculative characteristics as well."

B	"Bonds which are rated B generally lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small."
Caa	"Bonds which are Caa are of poor standing. Such issues may be in default or there may be present elements of danger with respect to principal or interest."
C	"Bonds which are rated C are the lowest rated class of bonds and issues so rated can be regarded as having extremely poor prospects of ever attaining any real investment standing."

Moody's International Manual 1981 at vi.

It is our understanding that once a rating slips below Ba there is very little market for a bond issue, even in the private placement market. An analysis of the various steel petitions in light of the various bond ratings identified above demonstrates the virtual certainty that a number of the steel companies would not have been able to raise funding through the bond or private placement market. For example, the Italsider Group lost $410.6 million in 1978, $310.6 million in 1979, 873.2 million in 1980, and $573 million in the first five months of 1981, and has required huge capital infusions to cover its operating expenses. Bethlehem Steel, Countervailing Duty Petition: Carbon Steel Mill Products from Italy at 21 ["Bethlehem's CVD Petition on Italy"]. Such a performance would appear to require a bond rating of C or at most Ca.

The private placement market in the United States in 1980 handled more than $12 billion of offerings. Merrill Lynch White Weld, "Investment Banking Capabilities" at 12. Even the U.S. marketplace would have had some difficulty (and hence would have charged an additional premium) absorbing the large amounts of debt instruments that would have been necessary to handle the cash needs of a number of the European steel companies in recent years even assuming that such instruments were of a high quality.

economic condition of a particular company or industry indicates that the company would have been unable to raise any funds. For example, the domestic steel petitioners have asserted that the financial condition of certain of their European competitors has been so poor for such a number of years that these companies would not have been able to raise funds at any price. See, e.g., Bethlehem's CVD Petition on Italy at 27; Republic Steel Corporation et al., Petition for the Imposition of Countervailing and (With Respect to Romania) Antidumping Duties, Vol. I at 31 (British Steel)["Republic's Petition"]; United States Steel, Petition for Relief Under the United States Countervailing Duty Statute from Certain Steel Products Imported from France at 23 ["US Steel French CVD Petition"]. Yet, the current agency methodology for handling such cash infusions, as we understand it, does not adequately weigh the true value to the recipient company finding itself in such a state of extremis. Rather the administering authority treats the benefit as being limited solely to the face value of the funds received (with the benefits allocated in one year for other than capital acquisitions and over half the useful life for those infusions resulting in capital acquisitions).

Such an approach provides no measurement of the risk factor involved in lending or investing in companies in deep financial difficulty. The closest capital market proxy to available equity funding for such a company would probably be the venture capital market--a relatively "thin" capital market not usually involved in "turn around" investment situations.* Yet assuming that the equity funds could be generated in the venture capital market, the expected rates of return that would be required by the investors would range from 40% to 80% per annum. The longer the investment period necessary to turn the company around and the greater the uncertainty of eventual economic health, the higher the required return on investment. In the case of a number of the steel companies in Western Europe, at the very least five years would be necessary to turn the financial health of the companies around. Such a scenario suggests that the provision of funds by the state confers a benefit of very great value to the recipient steel company.

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* See, e.g., Guide to Venture Capital Sources 7-9, 19-34 (6th ed., Stanley E. Pratt, Editor)(1982).

A similar approach to valuing the benefit received has been suggested by Republic Steel Corporation et al. Instead of considering a proxy for the infusion of additional equity, these five domestic steel producers have fashioned a proxy for the infusion of additional debt--a "creditworthiness proxy". See, e.g., Republic's Petition at 33; see also the methodology utilized by United States Steel, US Steel French CVD Petition at 23-26, 51-52. Any of the approaches has merit in attempting to value the benefit received by the particular recipients under investigation.

Conclusion

Whatever valuation method is used by the administering authority, it is important that the agency attempt to estimate the true value to the recipient company. To repeat the Court of International Trade's teaching, "The law is not concerned with the sacrifice made by the party supplying a financial resource but rather with the benefit experienced by the recipient." Michelin Tire Corporation v. United States, 1 CIT __, Slip Op. 81-94 at 14 (1981). Where the infusion of funds is into a company that has remained viable, the suggested proper methodology for determining the value of the benefit conferred is to estimate the before tax cost of capital for a similarly situated company seeking such additional financing. Where the company receiving the subsidy is in very poor financial health, however, the cost of securing financing requires a careful analysis of what sources of funds would reasonably be available to a company in such a financial condition.

Respectfully submitted,

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    Bethlehem Steel Corporation
    Carlisle Tire and Rubber Company
    Florida Wire and Cable Co.
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May 17, 1983

John J. Salmon, Esq.
Chief Counsel
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Re: Supplement to Prepared Statement of Terence P. Stewart, Esq., Law Offices of Eugene L. Stewart, before the Subcommittee on Trade at the Hearing on Trade Remedy Laws, April 19, 1983 in response to certain statements made in reference thereof.

Dear Mr. Salmon:

On April 19, 1983, the Law Offices of Eugene L. Stewart submitted extensive prepared testimony, summary thereof and oral testimony before the Subcommittee on Trade of the House Ways and Means Committee pursuant to hearings held by the subcommittee on the U.S. trade remedy laws. While our complete testimony of April 19, 1983 stands on its own, we would like to clarify the record before the Subcommittee with respect to certain misleading and erroneous statements made in testimony submitted by counsel for foreign interests after April 19th.

We would like to address two issues in this supplement to our prepared testimony: first, the allegation that the example presented on pages 46 to 48 (and presumably the example on pages 57-61) of our firm's prepared testimony dealing with the inequitable operation of the offset is "seriously flawed" as it assumes identical pricing to U.S. related and

* MEMBER N. Y. BAR, NOT ADMITTED IN D. C.; ** MEMBER CHARLEROI, BELGIUM BAR; NOT ADMITTED IN D. C.

unrelated purchasers--an assumption allegedly that does "not reflect commercial realities"; and second, the allegation that the deduction of profit earned by a related seller from U.S. resale prices has no support in the trade legislation. Statement of Robert M. Gottschalk at 16-17.

Concerning the first issue, the example presented on pages 46 to 48 and on pages 57-61 was intended first, to place in focus the dramatic adverse consequences of the particular practices engaged in by the administering authority which have the effect of explaining away massive margins of dumping. Those effects can most clearly be seen where all other variables, for purposes of the example, are assumed to be constant. However, the exact numbers used in the example are not critical to see the distortive effect resulting from the agency's current interpretation and practice--prices to a related party that were lower or higher would demonstrate the same bias from expected result.

Second, the allegation by counsel for the foreign interests that (assuming arguendo related parties use lower mark-ups) the example would result in larger margins being found in a related party than unrelated party situation is absurd on its face. The examples only show that the profit earned (assuming it to be at least a reasonable profit level) on resale is deducted from the related parties resale price to approximate the actual f.o.b. foreign port price envisioned by Congress in the exporter's sales price situation and that exists in the purchase price situation. Identity of profits is not required for the example to demonstrate the problem; profits higher or lower than those achieved by an unrelated purchaser's resale would demonstrate the identical problem.

Third, the question of profit and its treatment in the examples is totally irrelevant to the question allegedly addressed by Mr. Gottschalk's comments: the examples' demonstration that price discrimination engaged in by foreign producers selling through related U.S. importers is explained away by the administering authority's present practice of "offsetting" from foreign market value an amount for general selling expenses up to the amount of general expenses statutorily required to be deducted from the resale price in the United States. Nowhere is profit considered in the "offset" analysis.

Fourth, the examples in our testimony, as prepared, give the benefit of the doubt to the foreign producer, by assuming that there is no artificial pricing taking place between the related parties. If a foreign producer does not transfer the product to a related subsidiary at an identical price to that at which it sells to unrelated U.S. importers, the transfer price can only be either lower or higher than that to unrelated U.S. importers. If the transfer price were lower, our example would merely have shown that the possible price discrimination that is explained away is even greater than that shown where identity of price is assumed for illustration purposes. For example, if the figure on page 57, line 1, Column B, were reduced from $112.50 to $107.50 (and all other figures presented remained the same), the ITA's present interpretation of the law would still result in no dumping margins when the transfer to the U.S. related party was examined and a dumping margin of $37.50 for the unrelated party purchase, even though the unrelated U.S. importer paid $5.00 more. Reducing the transfer price more, or combining a reduced transfer price with a reduced resale profit in the United States merely result in the presence of some margin of dumping being found, much less than that for a higher priced sale to an unrelated U.S. importer. The obvious distortion of the agency's present practice remains regardless of the numbers used in the example.

If a foreign parent is transferring the product to the United States at a higher price than that offered to unrelated purchasers, the presumption would have to be that the related parties were transferring goods for tax minimization or dumping minimization purposes. *See*, discussion on section 482 of the Internal Revenue Code [26 U.S.C. § 482] *infra*. As with a lower price, the bottom line result would still show significant discrepancy in result dependent solely upon whether the foreign producer was related or not to the U.S. importer. It is that wrong which repeats itself on numerous occasions in the agency's interpretation of the statute (e.g. "Exporter's Sales Price offset"; e.g. "failure to deduct profits from the resale price") that distorts the administration of the law and which our proposed recommendations for statutory change would eliminate.

Fifth, the allegation that goods would never be transferred at an arm's length price between related parties contradicts the statutory scheme importers have long sought, viz., that related parties have their goods valued for customs purposes on transfer price, where transfer price can be shown by the importer or foreign producer to approximate arm's length prices to unrelated purchasers. U.S. customs law has recognized this possibility for the last quarter century at least [Customs

Simplification Act of 1956, Pub. L. No. 84-927, §402(g), 70 Stat. 943, 945 (1956) (current version 19 U.S.C. § 1401a(b)(2)(B) (1979)); Trade Agreements Act of 1979, Pub. L. No. 96-39, § 402(b)(2)(B), 93 Stat. 144, 194 (1979)] and this concept is similarly recognized in the Customs Valuation Agreement of the Multilateral Trade Negotiations signed in 1979. See, H.R. Rep. No. 317, 96th Cong., 1st Sess. at 79 (1979). Moreover, in our firm's experience in antidumping duty cases, we have found foreign parties and related U.S. importers requesting that their goods be valued, for customs purposes, on the basis of the transfer price. For that to occur, as the legislative history of Title II of the 1979 Act makes clear, the importer must be attesting that the prices are similar to prices of unrelated purchasers. See, S. Rep. No. 249, 96th Cong., 1st Sess. at 121 (1979).

Because of the obvious ability of related parties to set the price at whatever level they choose for internal corporate purposes, the Antidumping Act specifically has a special formula for safeguarding that the price in fact equates to the arm's length transaction price, f.o.b. foreign port.

Both the United States in its Internal Revenue Code and other countries and multinational organizations, such as the United Nations throught its draft Code of Conduct for Multinational Corporations, have provided strong encouragement to multinational corporations in fact, to transfer goods between subsidiaries at arm's length price. In the U.S. and other countries, there are penalties for a company which fails to do so. See, e.g., U.S. Gypsum Co. v. U.S., 304 F.Supp. 627 (N.D. Ill.

1969), aff'd in part, reversed in part on other grounds, 452 F.2d 445 (7th Cir. 1971) (Section 482 of the Internal Revenue Code requires "that amounts charged as a result of bargaining equal what would have been charged in an arm's length transaction."); United States Steel Corp. v. C.I.R., 617 F.2d 942 (2d Cir. 1980) ("Taxpayer has earned right to be free from reallocation of income between itself and another business owned or controlled directly by the same interests if taxpayer can show that the price he paid or was charged for his service is the amount which was charged or would have been charged for the same or similar services in independent transactions with or between unrelated parties ..."); Baldwin-Lima-Hamilton Corp. v. U.S., 435 F.2d 182 (7th Cir. 1970) ("Taxpayer's giving to subsidiary certain discounts which subsidiary would not have received as independent and uncontrolled distributor of taxpayer's products was not proper application of arm's length standard so as to preclude Commisioner's reallocation of income between taxpayer and subsidiary"); United States of America v. Toyota Motor Corporation, et. al., Court No. C.V. 83-0687-CHH (1982), (where the Justice Department is seeking pricing data from Toyota Motor Corp. of Japan in order to determine, for purposes of section 482, whether or not to reallocate income between the parent and its U.S. subsidiary Toyota Motor Sales, U.S.A., Inc.)

Thus as can be seen from the information identified above counsel for the foreign interest has conveniently failed to address the key issue presented by the hypothetical example in our prepared testimony and has rather sought refuge in alleged commercial truisms that upon closer examination, in fact, do not reflect the legal and business realities in the market place, and which, even if true, do not offer sanctuary for the blatant price discrimination that is excused by present administrative practice.

The other issue that we wish to address in this supplementary brief pertains to the comment that our recommendation that profit earned by a related seller on the resale of the product in the United States be deducted in determining exporter's sales price "has no support in the statute and would alter a long-standing practice in calculating dumping margins." Statement of Robert M. Gottschalk at 17. Even assuming arguendo the truth of the allegation made, the focus of the legislative oversight is to determine whether the statute and agency practice are giving domestic industries the relief from international price discrimination intended by the Congress in enacting the law. As shown in our firm's prepared testimony, both the 1967 and the 1979 Antidumping Code specifically require the reduction of profit on resale from the resale price in related party situations. Articles 2(e) and 2(f) of the International Antidumping Code of 1967 (allowance should be made "for costs, including duties and taxes, incurred between important and resale, and for profits accruing") [19 U.S.T. 4348, reprinted in S.D. Metzger, Law of Int's Trade: Documents and Reading, Supplement (1966) at 74-85]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232, pages 3 and 4, Articles 2 ¶ 5, ¶ 6. ("allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made").

As the Congress is well aware, the Trade Agreements of 1979 were specifically negotiated and adopted by the United States and confirmed, to the extent not inconsistent with U.S. law, by the Congress in the enactment of the Trade Agreements Act of 1979 [Pub. L. No. 96-39, 93 Stat. 144 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979)]. At most, U.S. law is silent on the question of deduction of profit. Under U.S. law the very specific terms of the agreement requiring the deduction of profit should be given effect as such a provision is not in conflict with existing U.S. law.

Moreover, the practice of our major trading partners with active antidumping duty laws is to deduct the profit added by the importer in reselling to an independent purchaser [e.g., Section 4A(iii) of the Australian Customs Tariff Act of 1975 (No. 76 of 1975), as amended by the Customs Tariff Amendment Act of 1981 (No. 66 of 1981); Section 10(2)(c)(ii) of the Canadian Anti-Dumping Act; Article 2, Par. 8(b)(iii) of the European Economic Community Council Regulation No. 3017/79, 20 December 1979].

The present practice of the administering authority constitutes nothing more or less than a special privilege for related parties that explain away a significant margin of price discrimination that the facts of record in any investigation clearly demonstrate to exist. Our firm's examples show the evil that our suggested legislative change would correct. There is no justifiable reason for the Congress to continue to permit U.S. industries to face international price discrimination from related parties. The Codes don't require such sacrifice; our trading partners have long recognized the importance of not permitting such a loophole; only the self-interest of those wishing to move the focus away from price discrimination condone the agency's practice--whether such practice is long standing or not.

Moreover, the alleged long-standing administrative practice is rooted in the failure of the administering authority to examine and understand the legislative beginnings and intentions that pertain to the mandatory ESP deduction for "commissions".

When legislation that would become the Antidumping Act of 1921 was being considered in 1921, the Senate Finance Committee took testimony from customs agents from New York City who had worked in close collaboration with the Chief Legislative Draftsman for the Senate. Their testimony sheds considerable light on the intended meaning of the word "commission" as originally enacted in 1921. The New York customs agent, steeped in the customs terminology from the 1909 and 1913 Acts, discussed the purpose of related party transactions and the examination of the resale price with certain mandatory deductions. ("...in the instance [where the American importer does not purchase directly but] where the goods are shipped to this country and consigned to some particular person to sell ...We would have to subtract ... the foreign agent's commission, or profit, and the net amount, is the amount that goes back to the other side becomes the exporter's sales price.") Colloquy between Senator Porter J. McCumber and George Davis, Special Agent in Charge, Customs Service, New York, Hearing on H.R. 2435 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. 42-43 (1921) (emphasis and bracketed material added).

Similarly in discussing the term consignment, the Chief Legislative Draftsman stated that the term consignment referred to all sales where the transaction price to an unrelated party were not known prior to importation--specifically those situations covered by exporter's sales price. Statement of John E. Walker, Chief of the Legislative Drafting Service, U.S. Senate, Hearing on H.R. 2435, supra. at 12.

A review of the history of the 1909 and the 1913 Acts would reveal a bifurcation of language used depending upon whether valuation based on resale pertained to a "sale" or to a "consignment". Where the term consignment was used, resale price minus the commission (not to exceed a certain statutorily identified amount) became the price for purposes of customs valuation. If a sale had occurred between the foreign producer and the U.S. importer then the resale price was subject to deductions for profit and general expenses. Tariff Act of 1909, Act of August 5, 1909, 36 Stat. 11 et seq.; subsec. 11 of sec. 28, reprinted in, Tariff Acts Passed by the Congress of the United States from 1789 to 1909, H.R. Doc. No. 671, 61st Cong., 2nd Sess. at 787 (1909); Section III of the Tariff Act of 1913, 38 Stat. 114 et seq. Thus the term commission in a consignment setting was used by the Congress and used by the Customs agents as being a substitute for profit and general expenses but specifically including profit.

The Congress has therefore always intended that profit be deducted from U.S. selling price. The administering authority and those representing foreign interests have either forgotten or chosen to ignore the legislative purpose and the legislative history that surrounded the terms used. Instead, the agency has used the term commission to make a mockery of the congressional intent by providing yet one more loophole through which general indirect selling expenses in the home market may be deducted from foreign market value reducing dumping margins--this time where the U.S. related importer pays its salesman a sales commission. No reference is made to whether the U.S. importer had received a commission from the foreign producer or what the general expenses and profit incurred in reselling the merchandise in the United States were, although these concepts were the intended focus of the statute.

The time is ripe for the Congress to put an end to a series of loopholes that have been administratively created that do not serve the Congressional mandate that injurious price discrimination be eliminated. Our firm renews its request to the members of the Trade Subcommittee of the House Ways and Means Committee to review carefully the prepared and oral testimony presented by our firm on behalf of domestic industries who have lived through the problems under existing law of obtaining the elimination of unfair trade practices and to consider carefully our proposals for legislative change. The antidumping and countervailing duty laws can be made effective. Domestic industries and their workers are dependent upon the laws being made effective.

Respectfully submitted,

Eugene L. Stewart
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Chairman GIBBONS. Mr. Stewart, your remarks are very scholarly, and I think are very much on target. I ask our staff to review the recommendations that you have made and to consult about this matter, and see what we can do to try to improve the operation of some of these laws.

I want to commend you for the painstaking way in which you have prepared your testimony. It is as detailed as I have ever seen in my years of attending these hearings. I think that it deserves very thorough consideration, and we will give it that kind of consideration.

Mr. STEWART. Mr. Chairman, on March 16, when the hearings I believe commenced, you requested that witnesses put aside their prepared testimony, which would be considered, and speak from the heart.

These are matters that we live with every day. The agencies live with them every day. There are some very serious and very honest differences of opinion. We can only judge it from the standpoint of a participant who represents the groups that we believe are the intended beneficiaries of the laws.

We do not find that the laws are providing the relief that is intended in many instances. Even when there are "final affirmative determinations" both by the ITC and the ITA, the massive price discrimination goes on unchecked, which is virtually no opportunity for expedited judicial review, although the courts do their best to cope with the issues.

Mr. Horlick talked about his being pleased that there was judicial review, that that kept the ITA in check, kept them honest in how they proceeded, as did Mr. Ervin. It is the case that the courts give a great deal of deference to how the agency acts, so if the agency chooses a policy that is not in sympathy with the congressional intent, it is very difficult, very difficult to get reversal.

I did forget to mention one issue concerning the ITC which is very troubling and that I do wish to have on the record before you, sir, and that is the question of judicial review of ITC determinations.

The chairman of the ITC, in his testimony on March 16, said that the ITC has never been reversed in its cases before the courts, and Mr. Ervin repeated that statement here today. That is technically not true, I can think of one case where, in fact, they were reversed out of hand by the court, but with that one exception, it is a true statement. We believe that a large part of that is due to the virtually unfettered discretion the Congress has put in their hands.

There are cases that we have been involved in, and other companies have been involved in them, where there have been repeated remands to the ITC from the courts where major factual and major legal errors were determined to exist by the court. The court sent it back to the agency, and there has never been a redetermination that changed the outcome of a case.

It is a singular accomplishment that the ITC as a collective body has never found itself to be wrong, despite the factual and legal errors that the court has found that they have committed.

We have proposed a recommended approach for the agency to consider to handle that problem because, in fact, the practitioners for the domestic industries that approach the International Trade

Commission believe that there is virtually no right to judicial review from an ITC negative determination. That cannot be the way it was intended by Congress.

The proposal that we have is outlined in our brief, and I will not trouble you with it, sir.

Chairman GIBBONS. I want to thank you again.

This concludes our hearing for today. Our next hearing will be on Wednesday, May 4, at 9:30 a.m., in the main committee hearing room in the Longworth Building.

[Whereupon, at 2:55 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, May 4, 1983.]

OPTIONS TO IMPROVE THE TRADE REMEDY LAWS

WEDNESDAY, MAY 4, 1983

House of Representatives,
Committee on Ways and Means,
Subcommittee on Trade,
Washington, D.C.

The subcommittee met at 9:37 a.m., pursuant to notice, in room 1100, Longworth House Office Building, Hon. Sam M. Gibbons (chairman of the subcommittee) presiding.

Chairman Gibbons. Good morning, ladies and gentlemen. As all of you know, this is a meeting of the Trade Subcommittee of the Ways and Means Committee. We are here taking testimony on proposals to improve the operation of such trade remedy laws dealing with unfair trade practices and with fair import competition. We are hearing Members of Congress this morning and witnesses from the private sector.

Our first witness this morning is Bobbi Fiedler, a Member of Congress from California. Ms. Fiedler, we are happy to have you here and you may proceed as you wish.

STATEMENT OF HON. BOBBI FIEDLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. Fiedler. Thank you, Mr. Chairman. I am very pleased to be able to be here this morning.

I would like to commend the committee for taking on the challenge of restoring America's competitive leadership. You have a difficult task before you.

I have introduced a piece of legislation called H.R. 966 which I believe will help strengthen our abilities in this area. H.R. 966 amends section 301 of the Trade Act of 1974. Section 301 permits the use of a wide variety of remedies against unfair trade practices by other nations.

H.R. 966 is divided into two parts: One, it requires an annual report to Congress by the executive branch on existing unfair trade practices and actions taken to correct them. The second part permits Congress to request, by passing a concurrent resolution, presidential action under section 301 of the Trade Act of 1974.

Why is this legislation important? Because currently Congress is excluded from the trade remedies process provided for under section 301. Section 301's broad remedies can reach many unfair trade practices that have encouraged protectionism and cost American jobs. Remedies available include countervailing duties and import quotas.

Currently, any action under section 301 can only be instituted by the President or by a business applying to the U.S. Trade Representative. The U.S. Trade Representative application process can be slow and cumbersome in resolution. Only 10 applications a year are received for that process. Some have gone unresolved for many years due to the required international negotiations.

How does H.R. 966 meet these needs through its two provisions? One, the reporting requirement gives Congress the information it needs to make full use of its expertise. This annual report will focus on each negative balance of trade and whether it can be attributed to unfair trade practices.

The report will include the executive branch's prior year's efforts to deal with unfair trade practices, to make sure that Congress does not duplicate or undercut them. Armed with such information, plus that gained from its own hearings and investigations, Congress will be permitted to act by passing a concurrent resolution requesting the President to take action under the provisions of section 301 against a specific country and in a specific case. If the President does not take such action within 21 days, he must publish his reasons for not taking such action.

Other benefits of H.R. 966: One, its enactment would deter foreign countries from an ongoing pattern of unfair trade practices. It does not prejudice or affect other trade remedies. It strengthens existing remedies consistent with international agreements.

It is a positive force for free trade against protectionism, and it shows congressional commitment to indirect involvement in the effort to combat job loss as a result of foreign unfair trade practices.

[The prepared statement follows:]

STATEMENT OF HON. BOBBI FIEDLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I appreciate having the opportunity to express my views concerning trade remedy laws. I have introduced legislation, H.R. 966, that I believe can make a significant contribution in this effort. I commend this Committee for taking on this challenge to restore America's competitive leadership.

We all know that free trade increases the standard of living of all our citizens. Likewise, we know, from experience, that protectionism hurts people. It increases consumer prices, limits consumer choices and international efficiency. America is an exporting nation. We all benefit from a free international flow of goods. Unfortunately, today, changing economic realities have pushed many nations away from the responsibilities of our interdependent global economy.

In recent years, America's export performance has declined. It may well continue to unless we seriously examine those restrictive policies of other nations restrain U.S. trade and our response to these barriers. We must provide the leadership to expand international markets, for the job situation in this country depends heavily on the future of our exports. With one out of five manufacturing jobs producing products for export, our action is demanded.

The effectiveness of existing trade remedy laws is, at times, questionable, only ten percent of American manufacturers export goods; a mere one percent of those businesses account for eighty percent of all exported merchandise. Thus, we must ensure that business—especially small business—is provided with adequate trade remedy laws or we cannot expect them to be involved in exporting and the resultant job creation it entails.

My testimony deals with Section 301 of the Trade Act of 1974, which authorizes the President to take all appropriate action to remove a foreign practice which is in violation of an international trade agreement or is found to restrict U.S. exports.

This appears a powerful weapon to defend the global economy, but the fact that only an average of ten applications a year are submitted to the U.S. Trade Representative for investigation, under Section 301, shows that this trade remedy is a cumbersome, expensive and time-consuming process.

We have seen a number of examples of the limitations to the practical applications of Section 301 trade remedies. After 14 years, the citrus issue has still not been resolved. The latest round of bilateral negotiations with the European Economic Community were abandoned after six years and finally submitted to the dispute settlement process available under the General Agreement on Tariffs and Trade. Clearly, something is wrong when an industry, and the people who depend on it for their livelihood, must be burdened with 14 years of unfair trade. Such terribly long, drawn-out processes give an incentive to our foreign competitors to continue the same unfair practices that Section 301 was written to combat. Their use of unfair trade practices will not be deterred by a process that has proved to be slow and uncertain.

Another limit to the effectiveness of actions undertaken pursuant to Section 301 was seen in the recent failure of the G.A.T.T. dispute settlement panel to make substantive findings in the European Economic Community wheat flour case.

While I have the greatest respect for the U.S. Trade Representative, our businesses, especially our small businesses, cannot tolerate such time lags in trade remedies, especially in today's highly competitive world market. We cannot scare away the ogre of protectionism with a blunt sword. We must let our international competitors know that Congress is committed to growth in trade and is standing beside the U.S. Trade Representative, ready to fight unfair trade practices.

I have introduced H.R. 966, a bill that would strengthen trade remedies available under Section 301 in two ways. First, by giving Congress the information it needs to effectively use this new capability through provision of an annual trade practices report and, second, by permitting Congress to become directly involved in the initiation of remedies under Section 301.

H.R. 966 would require the Department of Commerce to provide Congress with an annual balance-of-trade report. This report would specify the extent to which each negative balance of trade is attributable to unfair trade practices and what actions were taken by the Executive Branch during the preceding year, in response to Congress' actions.

The report would give Congress the full picture of the effect of foreign unfair trade practices on the U.S. balance-of-trade. Publishing the actions would show Congress what has been done and what needs to be done. While Commerce does provide limited information now, it does not provide information that focuses on specific unfair trade practices.

Currently, Congress is not directly involved in the Section 301 process; only the President or private business can initiate an application for investigation. H.R. 966 will give Congress a vehicle that provides leverage to directly affect the decisions the President makes on unfair trade practices, rather than being kept from direct involvement in this key area.

Congressional action would be initiated by adopting a concurrent resolution, citing a particular foreign trade action that Congress has determined to be unfair and requesting Presidential action. While 21 days, the President will publish, in the Federal Register, what action, if any, he is taking in response to such unfair trade practices. It does not mandate any specific sanctions by the Executive branch.

The annual report, combined with Congress' own expertise and resources, will make the Congress a valuable ally to the U.S. Trade Representative in his international negotiations and as a part of our national effort to keep America exporting.

H.R. 966 would complement the existing remedies available under Section 301 of the Trade Act of 1974 without prejudicing or weakening them. It would not affect or reduce any of the other remedies available, and in practice should present no obstacle to the use of any of them. Much proposed legislation has come before the Congress recently dealing with issues touching the broad spectrum of international trade. I believe H.R. 966 is entirely consistent with the thrust of what we, in the Congress, are trying to achieve—to encourage free competition and trade, but to discourage the unfair trade practices by foreign countries that have cost us so much in jobs and opportunities in the past.

Indeed, I believe that the enactment of legislation such as H.R. 966 would reduce the need for the use of any of the many remedies for our trade problems that now exist. Such legislation, by its very existence, would help to deter foreign countries from instituting or carrying our unfair trade practices. Deterrence would be helped by the knowledge that the Congress could act quickly to request action and to have the President come to grips with the issue. It would certainly be much more of a deterrent than the long adjudication times in many Section 301 proceedings.

Today, the institution of world trade is faced with a choice. It can either proceed toward protectionism and all the hardship that it entails, or proceed toward the free system of exports that holds the potential for economic growth for America. I believe that by adopting H.R. 966 and thus strengthening Section 301, we would be arming ourselves with a strong, sharp sword. A weapon that would deter as much as it would retaliate against those who have violated the rules on international trade. I urge this committee to give it its full consideration.

Chairman Gibbons. Ms. Fiedler, we appreciate your taking the time to come here this morning and tell us about this. Your bill has a number of very worthy points in it. We plan to make some changes in the unfair trade practices law this year.

As you perhaps know from your study, we made some very serious changes in 1979 and some back in 1974. But still, the enforcement of those laws leaves much to be desired, and your suggestions are positive constructive suggestions. I agree with you that unless we give help where help is really needed, and where help is really needed because of unfair practices, then we build a cynicism toward all of our laws that is very debilitating.

So I think you made some good suggestions. We appreciate them and we will see if we cannot incorporate some of those ideas in our trade legislation.

Ms. Fiedler. Thank you; I appreciate that, Mr. Chairman.

I feel that it is important that Congress have a means by which to become involved in this process, because we have faced such serious job losses in recent years, and of course as we lose a tremendous number of jobs to other parts of the world it is important that we scrutinize far more closely what it is they are doing when it comes to trade to make certain that they are being fair with us. Ultimately, it is our constituents that are being affected directly in a negative way if they are not.

Chairman Gibbons. Well, I agree with you. I find that there is a lot more information out there than is ever made known to Congress. Maybe that is our fault. But some practices have been prevalent for years without us taking much notice of them.

It is terrible to say that any recession has some positive effects, but it does have a positive effect. We are now much more sensitive to these unfair practices than we have been in the past. Some of them are developed because of the world's historical development and economic development, but those days are past now. We have to bring our lives up to date and we intend to do that.

We appreciate your help.

Ms. Fiedler. Thank you; it is my pleasure to have been here, and good luck with the task ahead of you.

Chairman Gibbons. I was not reading your testimony at the same time you were covering it. If there is any part of it that you left out, we will put the entire statement in the record.

Ms. Fiedler. Actually, I read from a brief summary some of the key points. I knew the committee would be hearing a lot of testimony.

Chairman Gibbons. We will put both of those in the record.

Thank you very much.

Our next witness in this hearing on trade remedies is Dr. Louis Vorzimer. He is an agricultural consultant and he will be introduced by our friend Mr. Gilman.

I am sure Mr. Gilman is tied up somewhere. Dr. Vorzimer, we will just let you introduce yourself. We are happy to have you.

STATEMENT OF LOUIS H. VORZIMER, AGRICULTURAL CONSULTANT, HASTINGS-ON-HUDSON, N.Y.

Mr. **Vorzimer**. Thank you, Chairman Gibbons and Congressman Schulze.

Chairman **Gibbons**. Go right ahead, Doctor. If you want to summarize your statement, we will put the entire statement in the record or you may proceed as you wish.

Mr. **Vorzimer**. Well, I thought I would read the entire statement.

Chairman **Gibbons**. All right, sir, that is perfectly all right.

Mr. **Vorzimer**. I picked up some of the statements of the other speakers and I found that I am brief, my statement is brief.

Chairman **Gibbons**. Yes, I was noticing that.

Mr. **Vorzimer**. So I think perhaps——

Chairman **Gibbons**. Sometimes good things come in little packages.

Mr. **Vorzimer**. I hope so.

I am Louis Vorzimer, president of Louis H. Vorzimer Associates, consultants to the agriculture industry. I represent the grower organizations of the New York State Vegetable Growers Association, the Empire State Potato Club, the Orange County Vegetable Improvement Cooperative Association, Inc., the Michigan Onion Growers Association, the Michigan Carrot Council, the Michigan Celery Promotion Cooperative, Inc., and there are many other grower organizations in a number of other States in the process of becoming part of the coalition.

Incidentally, Chairman Gibbons, this is almost unprecedented, for vegetable growers from different States to find that they can work in a common cause, shall we say.

First, the inadequacy of the present trade remedy laws for fresh vegetables. I refer to the Maine case for relief from subsidized Canadian round white potatoes. This of course is a very well-known case. Maine has been trying for more than 7 years to get a countervailing tariff on round white potatoes from Canada.

As recently as January 22, 1983, chief counsel for U.S. Trade Representative William Brock, Donald Kieffer, was quoted in the industry newspaper, "The Packer," regarding the Maine Potato Council petition for countervailing duties. He said: "The processing of legal actions generally takes a year." This is after Maine had been trying for 7 years.

After an extended period, the Maine council is again at the inception of an action. Maine is reported to have spent more than $200,000 in the process, an amount out of reach of most vegetable organizations. In fact, a much larger amount was needed for legal assistance to move them skillfully through the labyrinth of the trade remedy laws.

We should not lose sight of the fact that a separate petition and separate ITC legal proceedings would be necessary for russet potatoes or any other different type of potatoes and each additional vegetable group seeking relief. I think, Mr. Chairman, that that is lost sight of very often, and we are talking about an expense that runs into hundreds of thousands of dollars, and yet each item needs separate treatment and separate expense.

The next area I would like to cover is the unilateral position of Canada on round white potatoes in bulk. To crystallize the vast difference in the position of Canadian and U.S. vegetable growers, I would like to read the contents of a teletype from a farm news service. I think, Mr. Chairman, that this gives you the feeling of just what the situation is. The teletype:

> Canada halts bulk imports of U.S. potatoes. Presque Isle, Maine, July 30th. Canadian officials have stopped bulk shipments of U.S. potatoes from entering Canada, saying U.S. imports would create unfair competition.
>
> The Canadians said: "We have available for market enough potatoes of our own, plus U.S. potatoes coming in in bags," Agriculture Canada official Perry McIssac said. Canadian officials said they acted under a reciprocal 1937 agricultural marketing agreement between the U.S. and Canada. They said the U.S. might ban Canadian bulk imports under the same clause.
>
> But Stanley Greaves, Executive Vice President of the Maine Potato Association, said such action would be difficult to institute. Greaves said, "The U.S. has tried unsuccessfully in the past to restrict Canadian potatoes from entering the United States."
>
> Canada has been shipping increased amounts of potatoes into the U.S. eastern seaboard markets during the fall, winter, spring shipping season in recent years, in direct competition with U.S. states. The influx has brought large losses to Maine growers and touched off the current investigation by the International Trade Commission.

This is the end of the teletype. It clearly illustrates that on the one hand Canadians can take action, and it would seem logical that we could do the same, except that we cannot.

The discrepancy of the U.S. stance on world free trade and reality. The stated policy position of the United States is strongly advocating free trade. The impracticality of such a policy is highlighted by the opinion of the chief economist of the General Agreement on Tariffs and Trade, Jan Tumlin, in the November 29, 1982, issue of Newsweek to the effect that between 40 and 48 percent of international commerce is conducted under some form of nontariff restraint.

Mr. Chairman, I do not think that anyone would accuse Mr. Tumlin of exaggerating the figures, so I would say that we could take these figures as being not only accurate but perhaps understated.

In the long run, free trade benefits the world; there is no question about that. The problem is that we are no longer in a position to prevail in world trade. Moreover, we do not practice free trade. We have temporary or permanent quotas on the import of steel, autos, color television sets, sugar, textiles, and footwear.

There is a need to recognize the competition problems of U.S. industry. Imports have penetrated every segment of our economy, with few exceptions. Pretending that the problem does not exist will not solve it.

Our prime advocate of making "Made in America" mean something again is an example. When Lee Iacocca advertises the

Chrysler LeBaron convertible, he makes no mention that under the hood is a Mitsubishi engine. Moreover, 30 percent of Iacocca "Made in America" cars have engines by Mitsubishi or Volkswagen. This does not count the all-imported Japanese cars which make up 12½ percent of Chrysler's total. This appeared in the Washington Post of August 4.

The pretense of assuming an untenable position just serves to penalize small business with inadequate financial resources.

We do have a suggested program to improve the trade remedy laws. I will give you a description of the Canadian fast track surtax for perishable products. In 1979 a fast track system of import surtaxes to be imposed at times of unusually low prices was instituted. Under this system, a surtax on imports equal to the difference between the FOB price and a benchmark price, 85 percent of the average price of the past 3 years or 90 percent of the average price of the past 5 years, can be imposed for a small list of named products, including lettuce, potatoes, strawberries, and cherries.

This is the Canadian system. Incidentally, the process of recommending the placement of a surtax is automatic. This is a great difference, incidentally, when you compare this with the countervailing tariff. There also is no problem of legal fees, where a good lawyer in tariff procedure costs about $100,000 a year. This of course is out of the reach of most organizations.

In addition to the named products, for other commodities a decision on imposing the surtax must be made within 20 days of a grower request. Once in place, the surtax can remain for up to 180 days.

Despite some grower requests in Canada, the surtax was not utilized during 1979, 1980, and 1981. Recently, the surtax was used by Canada. A Canadian publication stated:

> Manitoba and British Columbia also have much larger stocks of onions on hand this year. They had good yields and a good quality crop. The West has had severe competition from onion shippers below the border. Quotations from Washington and Wisconsin have been as low as $1.75 to $2.25 for 50 pounds medium in recent weeks. In mid-October the Canadian Government imposed a surtax on all onions imported into the western tariff region, that is, west of Thunder Bay, Ontario.

Canada divides the country into three tariff regions. The far west is the third region.

The U.S. vegetable growers have no parallel mechanism. They have nothing to match this at all.

I think at this point, Mr. Chairman, that I should clarify the import-export position of the United States and Canada, because on the face of it we have a favorable balance of trade with Canada in vegetables, but if you look into it a little bit more there is a lot more to the story.

Canadians are heavy consumers of fresh vegetables. The weather conditions in Canada are very much like the weather conditions of New York State and other Northern Tier States. Consequently, New York State and Canada have periods which are in season and out of season for vegetables.

A priori, the Canadians concentrate their vegetable exports to the United States during their in-season. And incidentally, of course, that is the same in-season for our Northern Tier States.

The U.S. West and other parts of our country grow vegetables during the out-of-season period for Canada.

Canadian imports are concentrated during the out-of-season period. Virtually all of their vegetable imports come from the United States because of proximity, price and quality. A review of the out-of-season/in-season Canadian imports in percentage form will give you a quick view of the significance of this previous statement.

Celery: Canada imports out of season, at the time when they do not have celery, 84 percent of all their imports; in-season, 16 percent. Lettuce: 91 percent out of season, in-season 9 percent. Cauliflower: 87 and 13. Cabbage: 70 and 30. Carrots: 70 and 30. Potatoes: 78 and 22. Onions: 47 and 53.

Now, onions are atypical. Canadians are fond of what is known as long day type onions, such as Sweet Spanish. Canada and New York State both do not have the climate to grow this type of onion, even in season. There are heavy imports all year round.

The in-season shipments of Canadian vegetables to Northern Tier States is devastating. For example, a market close to Canada, Buffalo, received 50 million pounds of carrots in the 5 years ending 1982. During the same period New York State carrot growers shipped no carrots to Buffalo, which is in their home State. And incidentally, New York State carrot growers shipped no carrots to Canada at all in the same period.

On a national basis, especially during Canada's out of season period, the United States exports more vegetables than it imports from Canada. Even this position is changing. Up to 1981, the United States had a favorable balance in potatoes. In 1981, Canada exported more potatoes. In 1982, Canadian exports of potatoes exceeded ours by better than 2 to 1. The same position is developing for carrots.

The Canadians are pragmatic and assign a high priority to farming. They admit that subsidies are paid. In the September 18 issue of "The Packer," Eugene Whelan, Canadian Minister of Agriculture said:

> Producers receive aid if the cost-price return is below the cost of production and the crop does not return 90 percent of the last five years average. A federal program has been organized to reimburse the grower for this loss.

There are advantages of matching the Canadian fast-track surtax for perishable products for one of our own. The Canadian fast-track system is a flexible system. It is in its fourth year of operation and we know that it works. The Canadian experience is documented and available to us.

Some pitfalls could be avoided. Even Canada would be hard pressed to call our surtax unfair, since it is the same as their system which they presently have in operation. Unlike tariffs, the surtax is only used when needed.

In their zeal to help the growers, the Canadians have not conformed exactly to GATT article XIX. We would be willing to conform exactly.

There is a need for a U.S. strategy in agriculture. The Canadian Agricultural Outlook Conference opened in Ottawa on December 7,

1981. December 7, 1941, is the date recorded in American history. We may have reason to remember December 7, 1981.

The Canadian Agricultural Outlook Conference was concerned with a strategy which has been developed to feed the world population, estimated to be 6.4 billion by the year 2000. This planning is both amazing and frightening at the same time.

It is amazing because it is being implemented now. It is frightening because as time passes it will have a major impact on U.S. agriculture and the most likely result will be that the United States will have nothing in place to match the Canadian effort.

And as an aside for a moment, in our balance of trade it is the agricultural sector which has made the biggest contribution in recent years. I do not think we can afford not to keep it that way.

Further, it is ironic that the Canadian plan draws on the U.S. publication, "Global 2000 Report to the President," 1980. The Canadian plan is based on expectations of a rising domestic and international demand for agricultural products. The straight-line Canadian approach to implement the plan commands both respect and admiration.

World income will continue to grow to the year 2000, even though the growth rate will decline. Arable land per capita will decline to about one-half of what it was during the 1951–55 period, according to the proceedings report. And if we look at the world growth rate of per capita income, we find that during the period 1960–70, it was growing at a rate of 2.8 percent. During the period 1985–2000, it will still grow, but at a lower rate of 1.5 percent.

As far as the arable land per capita, in 1951–55 it was about 1.25 acres for every person in the world, but in the year 2000 it will decline to less than three-quarters of an acre for every person in the world.

In the 3 years from 1979–82, with 1979 as the base year, Canada increased its carrot production to 195 percent and onions to 143 percent. It is inevitable that increased Canadian production will affect the United States. In fact, it will move to a larger part of our country, away from the Eastern States and the Northern Tier States to the whole United States.

The United States without question needs a plan to anticipate Canada's strategy. You have asked for some suggestions to improve the trade laws, and I think that one of them could be an additional role for the ITC.

We suggest an additional role for the ITC. The ITC is capable and well informed. Small businessmen do not have the resources to keep well informed. Before small business groups petition for investigation, a long period of time passes. The initial damage can be devastating.

Part of the ITC's effort should be reoriented to monitoring the international marketplace for possible trade trouble spots. The ITC has access to many reporting services. A function of the ITC would be to advise small business groups of what is happening and possible avenues of redress. It is an approach not usually taken by a Government agency, but now is the time for innovative measures to solve our sagging position in the world economy.

Incidentally, Chairman Gibbons, it could be done without a great deal of trouble by the ITC sending the material to the local chambers of commerce, who would get it to the people directly concerned without too much trouble.

To summarize, the vegetable growers face a grim future. High expenses, including high interest costs, have made the vegetable grower vulnerable to failure within 1 crop year, whereas the timeframe formerly was 5 years. Many growers will do well to recover 50 percent of their costs.

Incidentally, I mentioned earlier the Canadian Government's concern to see that the growers get 90 percent of their costs in a subsidized program. If our growers do not recover 50 percent of their costs, that is just too bad as far as the growers are concerned.

The fast-track surtax is needed to avoid more farm failures. The growers are not asking for an advantage. Their only interest is to be on an equal footing with Canadian vegetable growers.

Thank you, Mr. Chairman.

[The prepared statement and summary follow:]

STATEMENT OF DR. LOUIS H. VORZIMER, LOUIS H. VORZIMER ASSOCIATES, INC., HASTING-ON-HUDSON, N.Y.

I am Louis H. Vorzimer, President of Louis H. Vorzimer Associates, Inc., consultants to the agriculture industry. I represent vegetable growers organizations of:

The New York State Vegetable Growers Association
The Empire State Potato Club
The Orange County Vegetable Improvement Cooperative Association, Inc.
The Michigan Onion Growers Association
The Michigan Carrot Council
The Michigan Celery Promotion Cooperative, Inc.
Other vegetable grower organizations in a number of States are in the process of becoming part of the coalition.

1. The inadequacy of the present trade remedy laws for fresh vegetables.

1.1 The Maine case for relief from subsidized Canadian round white potatoes.

Maine has been trying for more than seven years to get a countervailing tariff on round white potatoes from Canada. As recently as January 22, 1983, the chief counsel for United States Trade Representative William Brock, Donald Kieffer was quoted in the industry newspaper, The Packer, regarding the Maine Potato Council petition for a countervailing duty:

> Processing of legal actions generally takes a year.

After an extended period, the Maine Council are again at the inception of an action. Maine is reported to have spent more than $200,000 in the process, an amount out of the reach of most vegetable organizations. In fact, a much larger amount was needed for legal assistance to move them skillfully through the labyrinth of trade remedy laws. We should not lose sight of the fact that a separate petition and separate I. T. C. legal proceedings would be necessary for russet potatoes and each additional vegetable seeking relief.

1.2 The unilateral position of Canada on round white potatoes in bulk.

To crystalize the vast difference in position of the Canadian and United States vegetable grower, I would like to read the contents of a teletype on a farm news service:

> Canada Halts Bulk Imports of U. S. Potatoes
>
> Presque Isle, Maine--Jly 30--UCN--Canadian Officials have stopped bulk shipments of U. S. potatoes from entering Canada, saying U. S. imports will create unfair competition.
>
> "We have available for market (enough) potatoes of our own, plus U. S. potatoes coming in in bags," Agriculture Canada official Perry McIssac said.
>
> Canadian officials said they acted under a Reciprocal 1937 Agricultural Marketing Agreement between the U. S. and Canada. They said the U. S. might ban Canadian bulk imports under the same clause.
>
> But Stanley Greaves, executive vice president of the Maine Potato Association, said such action would be difficult to institute. Greaves said the U. S. had tried unsuccessfully in the past to restrict Canadian potatoes from entering the U. S.
>
> Canada has been shipping increased amounts of potatoes into U. S. Eastern seaboard markets during the Fall-Winter-Spring shipping season in recent years---in direct competition with U. S. States. The influx has brough large losses to Maine growers and touched off the current investigation by the International Trade Commission. End.

1.3 The discrepancy of the United States' stance on world free trade and reality.

The stated policy position of the United States is strongly advocating free trade. The impracticality of such a policy is highlighted by the opinion of the chief economist of the General Agreement on Tariffs and Trade, Jan Tumlin, in the November 29, 1982 issue of Newsweek, to the effect that between 40 and 48 percent of international commerce is conducted under some form of non-tariff restraint. In the long run, free trade benefits the world. The problem is that we are no longer in a position to prevail. Moreover, we do not practice it. We have temporary or permanent quotas on the import of steel, autos, color television sets, sugar, textiles, and footwear.

There is a need to recognize the competition problems of United States industry. Imports have penetrated every segment of our economy with few exceptions. Pretending that the problem does not exist, will not solve it. Our prime advocate of making "Made in America" mean something again, is an example. When Lee Iacocca advertises the Le Baron convertible, he makes no mention that under the hood is a Mitsubishi engine. Moreover, 30% of Iacocca "Made in America" cars have engines by Mitsubishi or Volkswagen. This does not count the all-imported Japanese models which make up 12½% of Chrysler's total. (Washington Post, August 4, 1982, B1). The pretence of assuming an untenable position just serves to penalize small business with inadequate financial resources.

2. A suggested program to improve the trade remedy laws.

2.1 Description of the Canadian fast track surtax perishable products.

In 1979, a fast track-system of import surtaxes, to be imposed at times of unusually low prices, was instituted. Under this system, a surtax on imports equal to the difference between the FOB price and a benchmark price (85 per cent of the average price of the past 3 years or 90 per cent of the average price of the past 5 years) can be imposed. For a small list of named commodities, including lettuce, potatoes, strawberries and cherries. The process of recommending the placement of a surtax is automatic.

For other commodities, a decision on imposing the surtax must be made within 20 days of a grower request. Once in place, the surtax can remain for up to 180 days. Despite some grower requests, the surtax was not utilized during 1979, 1980 and 1981.

Recently, the surtax was used. A Canadian publication stated:

> Manitoba and B. C. also have much larger stock of onions on hand this year. They have good yields and a good quality crop. The West has had severe competition from onion shippers below the border. Quotations from Washington and Wisconsin have been as low as $1.75 - $2.25 for 50 lbs mediums in recent weeks. In mid-October, the Canadian government imposed a surtax on all onions imported into the western tariff region; that is, west of Thunder Bay, Ontario.

The United States vegetable growers have no parallel mechanism.

2.2 The import-export position of the United States and Canada clarified.

Canadians are heavy consumers of fresh vegetables. The weather conditions in Canada are very much like the weather conditions of New York State and the other Northern Tier States. Consequently, New York State and Canada have periods which are "in season" and "out of season" for vegetables. A priori, the Canadians concentrate their vegetable exports to the United States during their "in season." The United States' West and other parts of our country grow vegetables during the "out of season" period. Canadian imports are concentrated during the "out of season" period. Virtually all of their vegetable imports come from the United States because of proximity, price, and quality.

A review of the latest available Annual Unload Report, Fresh Fruits and Vegetables, on 12 Canadian Markets, 1980, Agriculture Canada, revealed:

	Canadian Vegetable Imports	
Vegetable	Out of Season	In Season
Celery	84%	16%
Lettuce	91	9
Cauliflower	87	13
Cabbage	70	30
Carrots	70	30
Potatoes	78	22
Onions	47	53

Onions are atypical. Canadians are very fond of "long day" type onions such as Sweet Spanish. Canada and New York State do not have the climate to grow this type of onion even "in season." There are heavy imports all year around.

The "in season" shipments of Canadian vegetables to Northern Tier States is devastating. For example a market close to Canada, Buffalo, received 50,000,000 pounds of carrots in the five years ending 1982. During the same period New York State carrot growers shipped no carrots to Buffalo.

On a national basis, especially during Canada's "out of season" period, the United States exports more vegetables than it imports from Canada. Even this position is changing. Up to 1981, the United States had a favorable balance in potatoes. In 1981, Canada exported more potatoes. In 1982 Canadian exports of potatoes exceed ours by better than 2 to 1. The same position is developing for carrots.

The Canadians are pragmatic and assign a high priority to farming. They admit that subsidies are paid. In the 9/18/82 issue of The Packer, Eugene Whelan, Canadian Minister of Agriculture said:

> (producers receive aid) if the cost price return is below the cost of production and the crop does not return 90 per cent of the last five years' average.
>
> (A federal government program has been organized to reimburse the grower for this loss).

2.3 The advantages of matching the Canadian fast track surtax for perishable products.

The Canadian fast track surtax is a flexible system. It is in its fourth year of operation and we know that it works. The Canadian experience is documented and available to us. Some pitfalls could be avoided. Even Canada would be hard pressed to call our surtax unfair since it parallels their system. Unlike tariffs, the surtax is only used when needed. In their zeal to help the growers, the Canadians have not conformed exactly to G.A.T.T. Article XIX. We would be willing to conform exactly.

2.4 The need for a United States strategy in agriculture.

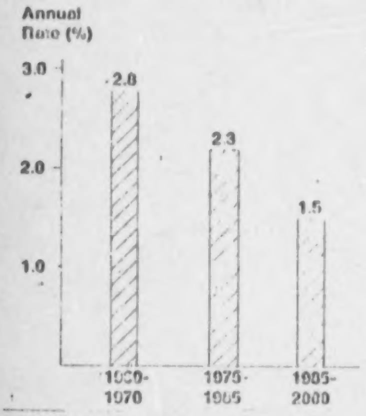
The Canadian Agricultural Outlook Conference opened in Ottawa on December 7, 1981. December 7, 1941 is a date recorded in American History. We may have reason to remember December 7, 1981.

The Canadian Agricultural Outlook Conference was concerned with a strategy which has been developed to feed the world population, estimated to be 6.4 billion, by the year 2,000. This planning is both amazing and frightening at the same time. It is amazing because it is being implemented now. It is frightening because, as time passes, it will have a major impact on United States Agriculture and the most likely result will be that the United States will have nothing in place to match the Canadian effort. Further, it is ironic that the Canadian Plan draws on the United States publication, Global 2000 Report to the President (Washington, D. C., 1980).

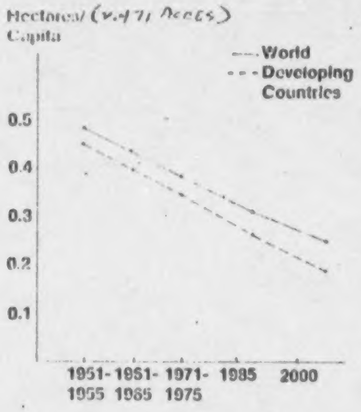
The Canadian Plan is based on expectations of a rising domestic and international demand for agricultural products. The straight-line Canadian approach to implement the Plan, commands both respect and admiration.

World income will continue to grow to the year 2,000 even though the growth rate will decline. Arable land per capita will decline to about half of what it was during the 1951-55 period, according to the Proceedings report:

ANNUAL RATE OF GROWTH OF WORLD PER CAPITA INCOME



ARABLE LAND PER CAPITA



In the 3 years from 1979 to 1982, with 1979 as the base year, Canada increased its carrot production to 195% and onions to 143%. It is inevitable that increased Canadian production will affect the United States.

The United States needs a plan to anticipate Canada's strategy.

2.5 An Additional role for the I.T.C.

The I.T.C. is capable and well informed. Small businessmen do not have the resources to keep well informed. Before small business groups petition for investigation, a long period of time passes. The initial damage can be devastating. Part of the I.T.C.'s effort should be reoriented to monitoring the international market place for possible trade trouble spots. The I.T.C. has access to many reporting services. A function of the I.T.C. would be to advise small business groups of what is happening and possible avenues of redress. It is an approach not usually taken by a government agency but now is the time for innovative measures to solve our sagging position in the world economy.

3. Summary

The vegetable growers face a grim future. High expenses including high interest costs have made the vegetable grower vulnerable to failure within one crop year whereas the time frame formerly was five years. Many growers will do well to recover 50% of their costs. The fast track surtax is needed to avoid more farm failures. The growers are not asking for an advantage. Their only interest is to be on an equal footing with Canadian vegetable growers.

A SUMMARY OF
GOVERNMENTAL ASSISTANCE PROGRAMS
AVAILABLE TO
POTATO PRODUCERS, PACKERS, PROCESSORS, AND DEALERS
IN
MAINE, NEW BRUNSWICK, AND PRINCE EDWARD ISLAND

Prepared for the
Marketing and Trade Committee

by the

New Brunswick Department of Agriculture and Rural Development
Prince Edward Island Department of Agriculture and Forestry
Agriculture Canada
Maine Department of Agriculture, Food, and Rural Resources

March, 1982

PROGRAMS TO ASSIST THE MAINE POTATO INDUSTRY

Program Title	Page No	DIRECT ASSISTANCE (Grants, Cost-Shares)			FINANCIAL ASSISTANCE		INDIRECT ASSISTANCE			
		Capital Investm.	Operating Costs	Income Supports	Loans 1/	Loan Guarantees	Crop Insur.	Land Leases	Tech. Services	Mgt. and Information
		'000 Dollars 2/			'000 Dollars 2/		'000 Dollars 2/			
PRODUCER ASSISTANCE										
FEDERAL ASSISTANCE										
Agricultural Conservation Program	1	584.1								
Potato Diversion Program	2			867.8						
Farmers Home Administration	3-5				22,647.9					
Commodity Credit Corporation	6				387.7					
Farm Storage/Drying Equipment Loans	7				102.2					
Soil Conservation Service	8								(	292.4
Crop Reporting Service	9									35.0
FEDERAL-STATE ASSISTANCE										
Maine Seed Potato Board	10								19.0	
University of Maine Extension Service	11									150.0
STATE/LOCAL ASSISTANCE										
Maine Seed Certification Program	12								20.0	
Soil and Water Conservation Districts	13									6.6
MARKETING ASSISTANCE										
FEDERAL ASSISTANCE										
U.S. Agricultural Marketing Service	14									21.4
FEDERAL-STATE										
Federal State Market News Service	15									18.5 3/
PACKER/PROCESSOR ASSISTANCE										
FEDERAL										
Economic Development Administration										
Economic Adjustment Grants	16	300.0								
Business Development Loans	17				1,400.0					
FEDERAL-STATE-LOCAL										
Economic Development Administration Technical Assistance	18									NA
Northern Maine Regional Planning Commission Revolving Loans	19				22.7					
Maine Guarantee Authority	20					307.0				

1/ Interest rates provided below privately financed rates. See text for degree of reduction.

2/ Expressed as a 5-year annual average expenditure.

3/ Does not include Federal share.

NA = not available

(= indicates secondary aspects of programs

PROGRAMS TO ASSIST THE CANADIAN POTATO INDUSTRY

Program Title	Page No	DIRECT ASSISTANCE (Grants, Cost-Shares)			FINANCIAL ASSISTANCE		INDIRECT ASSISTANCE			
		Capital Investm.	Operating Costs	Income Supports	Loans[1]	Loan Guarantees	Crop Insur.	Land Leases	Tech. Service	Mkt. and Information
		'000 Dollars[2]			'000 Dollars[2]		'000 Dollars[2]			
PRODUCER ASSISTANCE										
CANADIAN FEDERAL										
Agricultural Stabilization Act	21			4,060.0						
Fruit/Vegetable Storage Construction	22	46.0								
Seed Inspection Service	23								NA	
Farm Credit Corporation	24				NA					
Advance Payment for Storage Crops	25		174.8		3,059.0					
CANADIAN-PROVINCIAL										
N.B. Crop Insurance Program	26						23.0[3]			
P.E.I. Crop Insurance Program	27						716.0[3]			
N.B. Farm Development Program	28	340.0								
P.E.I. New Farmer Program	29	176.0								X
P.E.I. Family Farm Development Program	30	580.0								X
NEW BRUNSWICK										
Agricultural Limestone Assistance	31		139.8[4]							
Family Farm Improvement	32	NA								
Farm Adjustment Act	33				1,862.5			NA		
Interest Subsidies	34				NA					
Farm Machinery Loans	35					NA				
Contracts - Disease Eradication	36								X	50.0
Potato Industry Evaluation and Education	37								X	123.5
Bon Accord Seed Potato Farm	38								304.3	
Post Harvest Testing Program	39								45.7	
Soil Testing	40								NA	
PRINCE EDWARD ISLAND										
Seed Incentive Program	41		60.0[5]							
Cull Burial Program	42								150.0	
Potato Disinfection	43								300.0	
Agricultural Limestone Incentive	44		185.0							
Extension Service	45								X	NA
Land Development Corporation	46						NA			
P.E.I. Lending Authority	47				NA					
Fox Island Seed Farm	48								60.0	
MARKETING ASSISTANCE										
CANADIAN FEDERAL										
Department of Industry, Trade, and Commerce Export Programs	49		X							NA
Potatoes Canada	50		X						X	278.9
Atlantic Freight Assistance	51		NA							
Inspection - Tablestock	52								NA	
CANADIAN-PROVINCIAL										
Extension Marketing	53									NA

1/ Interest rates provided below privately financed rates. See text for degree of reduction.
2/ Expressed as a 5-year annual average unless otherwise noted. (1976-1980)
3/ Reflects net cost to government. N.B. program not well utilized until recent year.
4/ Three-year annual average (1978-1980) for potato production counties.
5/ 1979-80 budget; 5-year annual average, not available.

NA = not available
X = indicates secondary aspects of programs

5. Advantages of the Canadian Vegetable Grower

During 1982, the United States released two reports which were intended to settle the question of the competitiveness of Canadian potatoes with United States potatoes. The reports were:

1. The Competitive Status of Major Supply Regions for Fall Harvested Fresh White or Irish Potatoes in Selected Markets, United States International Trade Commission, August 1982.
2. A Summary of Governmental Assistance Programs Available to Potato Producers, Packers, Processors, and Dealers in Maine, New Brunswick, and Prince Edward Island, prepared for the Marketing and Trade Committee, March 1982.

Report #2 was a primary source used to evaluate the factor of subsidies in Report #1.

In general, the reports did not find that the Canadians had a competitive advantage. The researchers were professional in their approach but I disagree completely with their conclusions. The question arises, if I think that the researchers were so competent, why do I disagree with their conclusions? The reasons are fairly simple:

1. They did not distinguish the relative importance of each factor they considered.
2. They left out some of the most important factors or gave them superficial coverage.
3. The researchers are employees of government and are especially sensitive to political pressures coming from other components of government.

The population of the United States is approximately 230 million. The population of Canada is about 25 million. The relative competitive position of United States vegetable growers to Canadian vegetable growers is comparable to David and Goliath. We are David. To examine the rationale for this conclusion, we will review some of the factors which shape the trade between the two countries:

The Role of Government

The Canadian government has established a high priority for agriculture. It is a national objective to feed the world by the year 2000. All agencies of government are sympathetic to this objective, and could not be more responsive. It is only necessary to compare the statements of Canadian Minister of Agriculture Whelan with United States Secretary of Agriculture Block to get the polar differences.

GATT, Tariffs, Non-Tariffs, and Surtaxes

Several months ago, Canada arbitrarily shut out United States bulk potatoes and referred to a treaty for authority. For mysterious reasons, we could not respond in the same way.

For United States growers to get a countervailing tariff in place, it is a long tortuous task. Even if granted, it is worthless if it is not large enough.

Canadian growers can influence the imposition of non-tariff barriers with the help of a friendly federal government. In the United States, it is a difficult task.

The Canadians have in place a fast-track-system of surtaxes for vegetables. This system is described in Sectionl. On October 15, 1982, a surtax was applied to onions in Western Canada. We have nothing to match the fast-track surtax. The ITC report does not mention that, by itself, the surtax can keep United States vegetables out of Canada. Other factors become academic.

Subsidies

Summaries of Report #2, mentioned at the start of this section, are part of the Appendix to 5. The full report is part of Volume II, Appendix C. The ITC attempted to compare the subsidy programs of the two countries. This approach is an impossible task. Many of the programs are not comparable. Moreover, when the subsidies are further analysed on the basis of direct, indirect, and financial assistance the relationship becomes more tenuous. A statement in a prestigous Canadian publication, previously mentioned, establishes the Canadian commitment:[1]

> Total federal spending on agriculture is estimated at $897 million for 1978-79, about 1.7% of total federal spending as determined according to the Statistics Canada classification system. The agricultural sector contributes directly only about 3% of the country's Gross Domestic Product and employs slightly less than 5% of the nation's labor force.

There are Federal Canadian subsidies and subsidies granted by the provinces. It might be useful to look at some of the Federal subsidies:

I Title: Agricultural Stabilization Act
  Description:
  Producers may make application to the Minister of Agriculture to request that their crop be "designated" for deficiency payments
  Eligibility:
  Individual producers are eligible for assistance with maximum payments to apply according to criteria established by the Agricultural Stabilization Board.

II Title: Fruit & Vegetable Storage Construction Financial Assistance
  Description:
  Assistance for construction of new storage or renovation of existing storage which will extend the storage period and/or retain quality of storable produce at an improved level.
  Eligibility:
  Producer groups of 3 or more primary producers are eligible for up to one third of the total cost of the project but not to exceed 500,000 for any single project.

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[1] The National Finances, 1978-1979 (Toronto: Canadian Tax Foundation), p. 1.

III Title: Farm Credit Corporation Loans
Description:
The Farm Credit Corporation is a Crown agency established to make loans to farmers at interest rates fixed semi-annually on the basis of a six month bond market returns.
Eligibility:
Farmers are eligible for loans up to $200,000 maximum depending on collateral to back the loan.

IV Title: Advance Payments for Storage Crops
Description:
Agriculture Canada agrees to pay the interest on loans to producers who as an association undertake to market their produce in an orderly marketing scheme through specified purchases and to repay the principal amount of the loan as sales are made.
Eligibility:
A group of producers formed up into a legal organization to represent a significant portion of production in an area. 360 growers in P.E.I. and N.B. took advantage of the program in 1980.

These Federal subsidies give the Canadian grower a powerful advantage. Some provincial programs are even more generous. Volume II has a number of appendixes which have further details on subsidies:

Appendix D
The Canadian Agricultural Products Board and the Agricultural Stabilization Act.

Appendix E
Canadian Federal Policies and Programs for Agriculture

Appendix F
Canadian Provincial Policies and Programs for Agriculture

United States - Canada Currency Exchange Rates

The "Wall Street Journal" of 12/3/82, reported a Canadian dollar as being worth $.8061 U. S. It is likely that the currency exchange gives the Canadian grower an advantage. Quantifying the advantage would be difficult.

We have no serious differences with the ITC Report. The exchange rate cannot be accepted at face value. Purchasing power in each country must be taken into account. Purchasing power could differ from the exchange rate because exchange rates of currencies are based only on the goods, services, and capital transactions traded between countries. These transactions are not a complete reflection of the total spectrum of goods and services in a society. Consideration must be given to comparable interest rates, building costs, union versus non-union wages, differing are accounting policies in each country, as well as many other expenditures.

Political

The political factor cannot be dismissed without assigning considerable importance to it. There was a period in which our energy policy had a strong bearing on other policy decisions with Canada. Matters important to the United States Department of State as well as other government departments and agencies will enter into policy making decisions.

Canadian vegetable growers have a staggering advantage over their United States counterparts. Privately, we believe that they would be the first to admit it.

Chairman GIBBONS. Thank you, sir.

Now we will hear from Congressman Gilman.

STATEMENT OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. GILMAN. Thank you, Mr. Chairman.

Mr. Chairman, I want to thank you and the committee for taking the initiative today in arranging for this hearing, a hearing that is critical not only to the agricultural community in my own Congressional District in the Hudson Valley of New York State, but throughout the Nation. It is important that options to our Nation's trade remedy laws be scrutinized, since many industries across America are unable to find successful redress from the laws as they currently apply.

I want to commend you, Mr. Chairman, for all of the efforts you have undertaken on behalf of the Congress in many international forums in attempting to find some reasonable mechanism for fair trade.

As you know, I have been working on a particular situation for the farmers in my own district who are currently suffering from an onslaught of Canadian fruits and vegetables. Other farmers, potato growers and carrot growers, particularly in the northern tier States along the Canadian border, have become involved of late in this group. These farmers are looking for ways that these problems can be overcome.

Mr. Chairman and members of the committee, I plan to introduce legislation soon which will fashion itself after the highly effective Canadian fast track surtax provisions. It is my hope that in considering amendments to the trade remedy laws that your able subcommittee will look favorably upon this proposal.

I have invited Dr. Louis Vorzimer to be a witness today because he serves as our farmers' consultant and has developed an expertise with regard to this issue. Dr. Vorzimer is also a constituent of mine from Hastings-on-Hudson and has gathered a great deal of information on the problems confronting the northern tier farmers, the New York farmers in particular, who have been experiencing an impact from Canadian fruits and vegetables which have been flowing into our market at depressed prices.

I believe that what Dr. Vorzimer had to say and what the farmers have to say is important indeed, and I feel that Congress is going to have to address this problem in order to alleviate the present situation.

Mr. Chairman, again permit me to thank you and the committee members for arranging time for us. I am confident that after hearing the testimony, and I hope that after reviewing the legislation that we will be introducing, that you will be able to respond to the outcry for help.

Thank you, Mr. Chairman.

Chairman GIBBONS. Thank you, Mr. Gilman. I thank both of you for coming here and for further sensitizing us to the problems of the farmer.

Let me ask first of all some questions about Canadian subsidies. I am familiar somewhat with their fast track system. Are they subsidizing carrot production and onion production?

Mr. VORZIMER. They have an extensive program of subsidies at both the federal and the province level. It is a very long list, Mr. Chairman, and perhaps you would like me to send to you a summary of the subsidies. They are really too long to mention.

Chairman GIBBONS. Well, I would like that, but could you mention some of them, because sometimes I do not get a chance to read these things that come in late. Tell me what you remember offhand about their subsidies.

Mr. VORZIMER. Well, for instance, if an American vegetable grower wants to build a storage facility he has to go out and get the money and do it. In Canada, if three vegetable growers want a very effective storage facility, the Government will advance them up to a half a million dollars to build it.

Chairman GIBBONS. Is that a loan or a grant?

Mr. VORZIMER. That is a grant.

Chairman GIBBONS. A grant of up to a half a million dollars to build a storage facility for three farmers?

Mr. VORZIMER. Just three farmers. That is one of them.

In certain provinces such as Quebec, I think I mentioned to someone, the best thing that could happen to a person is to be born a farmer, because Quebec is by far the most generous. They will even subsidize irrigation, insurance. There is not anything that Quebec will not do. This is in addition to the federal programs.

Chairman GIBBONS. Why do the people in Quebec do that? What motivates them to do that?

Mr. VORZIMER. I think it is the form of government there, Mr. Chairman, which is more socialist in nature than the rest of Canada, and so they go further. But the other provinces really do quite well. They have crop insurance which is partly paid for by the government, partly by the farmers. There is nothing like that to compare in the United States. Almost anything you think of.

And of course, Minister Whelan mentioned that if a farmer finds he has too much production and he does not recover 90 percent for 5 years, the government will make it up. And so the Canadian vegetable grower has a great incentive not to plow the vegetables under, because then he would get nothing, but to ship them into the United States at a very low cost and then go back to the government and say, well, we have not made our production costs. The government will be very happy to furnish them the difference. That is what hurts.

Chairman GIBBONS. Is there no acreage limitation along with that?

Mr. VORZIMER. There are no limitations. I would presume that there are some budgetary limitations, but I do not think that has been a problem.

Chairman GIBBONS. Well now, those are obviously a violation of our countervailing duty laws. Has anyone tried to bring a case in that regard under our countervailing duty statute?

Mr. VORZIMER. Yes, Maine tried 7 years ago, and they are getting very weary of the whole process, because they do not have that much resources that they can just keep on trying. And that is part of the trade remedy. The $200,000 that they spent to try to bring about a change was really totally inadequate.

Chairman **Gibbons**. I realize that for perishable crops a countervailing duty is not anything other than a long-range discouragement. It does nothing for the year in which the farmer had to bury his crop and eat it.

Mr. **Vorzimer**. That is right. Canada is light years ahead of us in being responsive to the farmer, and without even looking at something, we work on the basis that if Canada has it it must be good, because they have given attention to this years before we have even tried to do anything about it.

That is why we would be content with a fast-track surtax that they have without trying to get fancy and come up with something better. We would be satisfied with that.

Chairman **Gibbons**. I assume you are an economist. Do you think all of these rather ridiculous practices that Canada has may have something to do with the fact that their dollar has slipped in value almost 25 percent in the last 4 years?

Mr. **Vorzimer**. I do not know that that really has such a great bearing, Mr. Chairman. I think that Canada has a small population, maybe 25 million people. They have a lot of land that they have not put to work. The Japanese, the Germans are very good in manufacturing. The Canadians know that they have a very valuable resource in the land, which is declining rapidly all over the world through poor care or saline problems. So they know they have something in that and so they have said as a national goal that they would further the productivity of the farms, give them every advantage.

And I think I read earlier that it is reflected in the statement that was made by Minister of Agriculture Whelan. He said: Producers receive aid if the cost-price return is below the cost of production and the crop does not return 90 percent of the last 5 years average.

They have made a commitment. They know where they can plan ahead and really do something for Canada that will help it.

Chairman **Gibbons**. I am really talking about a whole collection of Canadian economic policy, including agricultural policy. I hate to see a country as rich in resources as Canada taking a nosedive, because they decrease our security as well as decreasing their own——

Mr. **Vorzimer**. That is true, Mr. Chairman.

Chairman **Gibbons**. When they foul their economy up, and they certainly have done that in spades in the last few years.

Mr. **Vorzimer**. They have not instituted very productive policies. Minister Trudeau, his petroleum policy has backfired because of the change in the world market, and that has created a great deal of instability.

Also, the effort to take over American companies has caused a flight of capital and other instability, which just makes up a poor economic policy.

Chairman **Gibbons**. Their fast track system, would you describe for me again how it works?

Mr. **Vorzimer**. Yes, sir. Well, to put it very simply, the Canadian Government looks at prices for the last 3 or 5 years and they say, well, this is a benchmark price, this is what the average price should be. If it falls below that at the market, it will trigger a surtax to be an amount in the difference between the invoice price and the benchmark price.

It is an automatic process for certain commodities that are named. If the commodity is not named, on petition of the growers it is presented and acted on within 20 days. The named products are automatic.

They will check the invoices at the border and if they see that the invoice price is below the benchmark price, they will add a surtax. Now, that sounds very neat, except when it applies to us. When the Canadians ship over our border, they are shipping many things by consignment and many of the prices on the invoices, if we were to have a surtax system, are inflated so that they can avoid the surtax.

We would have to take other means, which we have determined already, to see that consignment shipments, which really flood the market—the price of 50 pounds of carrots could be $5 on the invoice, but meanwhile a telephone call to someone in the United States telling them, well, you only have to send us $3.

We have a means of taking care of that, several alternatives as a matter of fact, in our proposal.

We do not have the same problem as the Canadians because, again, they ship during our in-season. We ship mostly when they need the produce and there is no need to ship it on consignment, where you know that it is going to have a market.

Chairman GIBBONS. The named commodities, are those, lettuce, potatoes, strawberries and cherries, or are there other named commodities?

Mr. VORZIMER. Those are the named commodities. But we would have perhaps a different list of named commodities because of our special needs.

Chairman GIBBONS. These five items here——

Mr. VORZIMER. They have considered it to be the products that need the fastest action, and it is automatic. As soon as the market price dips below the benchmark price, then the surtax comes into play.

Chairman GIBBONS. It is automatic?

Mr. VORZIMER. Yes, sir.

Chairman GIBBONS. It is kind of like the European system, is it not, with a variable levy?

Mr. VORZIMER. Yes. Well, I think that the Europeans have their taxes in effect just about all of the time. The surtax is only in effect when the market price dips below the benchmark price.

Chairman GIBBONS. But it operates the same way. It is a governmental perception of when the price is too low then kick up the levy at the border.

Mr. VORZIMER. The end effect is the same.

Chairman GIBBONS. They do not include tomatoes in the named commodities?

Mr. VORZIMER. I beg your pardon?

Chairman GIBBONS. Are tomatoes in their named commodities?

Mr. VORZIMER. No. I do not think they have found that tomatoes have been a problem with them.

Chairman **Gibbons**. The reason I asked that is that a couple of years ago I ran into them getting ready to slap some kind of surtax on tomatoes.

Mr. **Vorzimer**. You are right, Mr. Chairman, and not too many people know about it, but all the press says that the surtax was applied for the first time to onions last year. It is not true. The surtax was applied to canned tomatoes a number of years ago. But there has been no problem since. This is really the second time.

Chairman **Gibbons**. Mr. Pease?

Mr. **Pease**. Mr. Chairman, I only have one question. Do the Canadians ever complain about our subsidies? I read in the paper the other day where the PIK program for grain that we just put into effect this year is likely to cost $8 to $10 billion this year.

Do the Canadians consider that a subsidy? And does the cost of their subsidized program exceed that?

Mr. **Vorzimer**. Yes, sir, they do complain about us very often. The problem with that is that they consider things to be subsidies which are not direct subsidies to the farmer. They consider our Extension Service to be a subsidy, and control of water.

These things are somewhat removed from the vegetable grower. They help him, of course, except that Canada has the same thing, which they do not talk about, and that when the farmer cannot pay his mortgage, which quite a few in Orange County cannot do—they are desperate right now—it does not help them too much to know that they are getting a lot of assistance from the Extension Service and other advantages, but not at the bank.

Now, the Canadian grower gets more of the subsidies at the bank, and I must say [illegible]—you have noted that I respect the ITC. They are really a [illegible], I think one of the best in Government. But when they [illegible] on the potato situation with Canada and Maine, I do not [illegible] they were too objective, because they compared subsidies [illegible], well, you know, water, extension and all the rest, that [illegible]

But they did not [illegible] the relative impact on the grower himself. And it also is a fact that it is very difficult to compare unlike subsidies. Moreover, they did not take into account the fast track surtax that Canada has in place, which they can implement any time and stop the problem.

Maine, of course, tried that with a countervailing tariff and they got strapped for money. They weren't successful, and any other vegetable group that I know in the Northern Tier—they would not have that much money to begin with.

So there are differences which the International Trade Commission did not take into account, and I think that what we must do is have a system which is much less cumbersome, and the surtax is that.

Mr. **Pease**. I think your point is very well taken. General, indirect subsidies are quite different from farmer and industry-specific subsidies. And I think you have also made a valuable point regarding the cost of pursuing remedies.

A lot of the remedy cases that are brought before our Government now in the Commerce Department and the ITC are brought by large corporations which can afford $100,000 or $500,000 or whatever in legal fees, whereas the average farming cooperative is not in that kind of position.

Somehow, Mr. Chairman, I think in looking at the trade remedies we need to figure out a way to make that system available to ordinary persons.

Mr. Please, let me ask one question along that line. When we had testimony a week or so ago from the Commerce Department, the testimony was that if a suit is filed, a countervailing duty suit or whatever, that the petitioner really does not have to have his own attorney; he does not have to do any work. He brings the complaint. He gives some information on which the Commerce Department can act. And that the department will, with its own resources, go out and investigate and make a determination.

And we asked well, does it make a difference if an organization spends $100,000 for an attorney, and the answer was well, yes and no; that it may in the sense that there is maybe a little more information provided, but that actually the Commerce Department—at least this witness—felt that the department would do an adequate job with its own resources of pursuing a complaint filed by an impecunious potato grower or whatever.

Would you comment on that from your experience?

Mr. **Vorzimer**. Yes, Congressman Pease.

I think a parallel example is that if you want a patent, you can get a very expensive patent attorney and know that the thing will go through with protection in different features so that someone else will not infringe on it, or you can get a Government booklet for 25 cents and do it yourself. However, you can make a lot of mistakes, and nothing can come of the patent.

Now, as far as you being able to go ahead without legal help—I am putting it in very kind words—that has to be considered as a matter of opinion, because I went out of my way to talk to two attorneys of the ITC whom I shall leave nameless, and they thought it was quite impossible. And the $100,000 fee for a good tariff lawyer, they are the source, not me.

If you look at the different variations of the dumping law, the below-cost law, and know which path to take, then I would say that whoever can do that is a better man than I am because I find those intricacies quite difficult to fathom. The law works if you are rich.

Not so long ago, as a matter of fact toward the end of last year, a group of Florida citrus packers applied for relief from Brazilian orange juice. It was wonderful. They got it in 3 months. But I think if you look into that you find that they did not get a clerk in the office to arrange the whole thing for them. They got the best tariff attorney to help them, because they were precision plus. They knew the path to take, and they knew the nerves to press, and they did get it in 3 months. Maine has been trying for 7 years.

Mr. **Pease**. Well, thank you. I think that is very helpful.

I am reminded of the great cartoon in the New Yorker a couple of years ago which showed a man consulting with an attorney. The attorney was saying, Yes, sir, I think the facts are entirely on your side. Now the question is, how much justice can you afford?

Mr. Chairman, I yield back the balance of my time.

Mr. **Vorzimer**. I think that is a good parallel.

Chairman **Gibbons**. It is a problem with the American judicial system.

Mr. **Vorzimer**. Yes.

Chairman **Gibbons**. Or a characteristic of it, unfortunately.

Thank you very much. We appreciate it.

Mr. **Gilman**. Mr. Chairman, Mr. Pease and the committee, we thank you again for your patience and indulgence.

Chairman **Gibbons**. Thank you, Mr. Gilman. We appreciate it. A very interesting testimony. We look forward to seeing your bill and will see if we can adopt some of the provisions of it.

Mr. **Gilman**. Thank you. We hope to introduce it at an early date, Mr. Chairman. Thank you.

Chairman **Gibbons**. Our next witness is Richard Cunningham, appearing here in his individual capacity.

Mr. Cunningham, we welcome you.

STATEMENT OF RICHARD CUNNINGHAM, STEPTOE & JOHNSON, CHARTERED, WASHINGTON, D.C.

Mr. **Cunningham**. Thank you, Mr. Chairman.

I am almost suprised to be welcomed, as a practicing attorney, after that last interchange on legal fees.

Chairman **Gibbons**. Well, I am one, too. I used to be. But I realize the problems that we have in our system, and I think all lawyers understand the problem.

Mr. **Cunningham**. Yes. I might——

Chairman **Gibbons**. The problem is finding a solution.

Mr. **Cunningham**. Indeed. I might, before going into my testimony, just address that fact because I would concur that these are very expensive cases, and the $100,000 figure quoted may be a conservative figure if the case is a complex case.

I guess my view of it is that there are indeed some cases, what I would call the caught-red-handed type of case, where a satisfactory result could well be achieved without any counsel at all. I think I hear my fellow members of the bar quaking in the background as I say that. But that is not the typical antidumping or countervailing duty case certainly, and it is certainly not the typical case under a discretionary statute where political considerations and policy considerations come into play. More typical is the case where legal help can make the difference.

Chairman **Gibbons**. That is one of the areas that I hope we can bring under closer focus this year in legislation.

Go right ahead.

Mr. Pease.

Mr. **Pease**. Since we started in that general discussion, I would like to extend it just a moment. I do not know what the solution is to the problem, but it occurs to me that we have here a system which requires a good deal of legal expertise. We also have a number of clients seeking help who have considerable financial resources and can afford to pay it. And that, it seems to me, sets up a system where the attorneys charge very substantial fees to their clients for the specialized information they have. But the problem is what happens to the people in that system who do not have substantial resources but who are injured nonetheless and need some assistance.

I think that is one of the things I would like to focus on as we consider these trade remedies.

Mr. CUNNINGHAM. Let me address that for just one moment, because I agree with you entirely, and I did some work last year with Senator Mitchell's staff on that very issue.

They were talking about an ombudsman concept at that point, which is a concept, I might say, which I endorse. One of the problems that gives rise to the large legal fees in a trade case—and mind you, it is a type of case in which if one reads the statute, one would assume that here is a government investigating agency which goes out and investigates to try to prove whether a violation has occurred or not—one problem is that there is not, however, an investigative or prosecutorial approach taken to these cases by the Government. It may well be that as a policy matter we conclude there should not be, but until there is an attitude on the part of the Government that they are investigators and enforcers rather than policy appliers or impartial, sometimes leaning to fair trade arbiters, it is going to take some effective legal work on the outside to get results.

Chairman GIBBONS. Go right ahead, sir. We are happy to hear from you.

Mr. CUNNINGHAM. Thank you, Mr. Chairman.

My name is Richard Cunningham. I am a member of the law firm of Steptoe & Johnson, Chartered. I have been working in the trade law area for over a decade, and my practice represents not only U.S. industries seeking relief, but also foreign companies defending such cases.

I appear here not, however, to represent the views of any of these companies or of my firm, but rather to state my own views as a practitioner concerned about several discrete areas in which I feel these laws are not working properly.

My written statement, which I hope will be included in the record as a whole, deals with five such areas. I want to focus my remarks today on two of them.

The first I want to touch briefly on is one of those discretionary policy-oriented areas in the statute that we mentioned a moment ago, Mr. Chairman, and that is section 301.

Back in 1979 this Congress was presented with a series of GATT codes of fair conduct in international trade, and the question was quite logically raised: Are these glittering codes going to be of any use to U.S. industries that are afflicted with unfair practices by foreign governments? And the answer given was, by George, they are. We are going to have section 301 as an effective vehicle for enforcing U.S. industry rights against unfairness in international trade.

Section 301, however, has been a great disappointment. It is very difficult, I think, to point to any substantial case brought under section 301 which has achieved an effective result for the U.S. industry. I am afraid that the basic problem is that this is a discretionary statute in which the Federal Government is apparently unwilling to put the teeth into it, to take the unilateral action, which is necessary to make foreign governments respect that approach to solving problems.

The specialty steel case, which was brought last year, in which I might say I was on the defense side of the case so that I do not want to get into the merits of the case; but the specialty steel case does seem to me to represent very clearly the attitude of foreign governments toward section 301. And I know because I was representing the British in that case. I dealt with many of the Common Market officials in that case. Nobody in Europe believed at any time that the United States would be willing to invoke sanctions under section 301, nor did they fear the issue being taken to the GATT under 301 because they felt that they could get a favorable ruling in the GATT, and they were absolutely right. They were absolutely right that the U.S. Government would not take it to the GATT. They were absolutely right that the U.S. Government would not impose unilateral sanctions. And indeed, the U.S. Government decided to turn it into an escape clause case, which I think was a very poor choice of remedies and amounted to a concession that section 301 just does not work, so let us turn to another statute. The Government did it, mind you, while saying in the same voice that this was a good case, that there were subsidies, and that U.S. industry was being injured.

The Government has been more aggressive in taking the common agricultural policy cases to the GATT, but has met with what I fear any observer who knows how the GATT operates would have predicted as the result of those cases—namely that it is too sensitive an issue, so the GATT punted. And this happened even in the wheat flour case, which is the one case which I am particularly familiar with because a friend of mine was very much involved in that before going into Government service. That was a very good case, a case in which there is not only an absolutely clear subsidy but a clear increase in the European share of world markets as a result of that subsidy. Yet the GATT reached the inexplicable conclusion that the increase in the European share of world wheat markets had nothing whatsoever to do with, or could not be traced to, the susidies.

Whatever the reason for the failure of 301, it seems to me the remedy is fairly clear. What we need to do is think about limiting the President's discretion—not eliminating the discretion entirely, but limiting the President's discretion in cases where he finds there is a violation and the U.S. industry has been injured. I have suggested some specific aspects of that in my testimony.

Let me turn now to what I think is the single greatest failing in the U.S. trade law arsenal at the moment. It is a failing, ironically enough, in a statute which is otherwise working fairly well, which is the countervailing duty law. And the failing is that this administration at least, and I suspect administrations before it as well, are simply unwilling to apply that law to upstream subsidies.

Let me make clear what I mean by an upstream subsidy. An upstream subsidy is a subsidy that is not given directly to the exporter by the foreign government. Rather, it is given to an upstream company, a company which supplies to the exporter a major cost component.

I am going to give you two examples taken from recent cases in which I feel there were fairly clear upstream subsidies, but where the law was not applied to those subsidies. Both examples are taken from the steel cases, but this is an issue which applies also to fertilizers from Mexico, to leatherware from Argentina, to chemicals, and to numerous other trade areas.

Let me first describe to you what was perhaps the key issue in all of the European steel cases last summer, and that was the German coal issue. It was the key issue because the failure to apply the countervailing duty law to a clear subsidy given in the way of reduced coal cost to the German steel producers completely changed the whole negotiating posture of that case.

About a decade ago the German steel producers owned their own coal supplies, their own coal production facilities. Those facilities, however, had become high cost because the coal seams were giving out, and they were outmoded facilities, outmoded mining facilities. The German steel producers, therefore, were becoming uncompetitive. An agreement was reached between the German steel producers and the German Government in which the coal-producing facilities were taken out of the steel producers and put into a new corporation owned partly by the German Government and partly by the steel producers themselves.

A series of contracts which nobody has ever disputed, which are on the record in the steel cases, were then entered into between the new steel company—excuse me—the new coal company and the German Government and the steel producers in Germany. The coal company would supply all of the needs of the steel producers, and the steel producers would be required to buy their coal from the coal company. The coal company would sell it to them at a price no higher than coal world market prices, even though it meant that the coal company was selling at a loss, well below cost of production, which it did in every year except 1975, I believe.

The effect of that was very clear. The German steel producers, which absent this arrangement would have had to pay substantially higher than world market prices, got world market prices and became competitive in their coal costs again.

Countervailing duties were not applied. It was argued that since the price was no lower than world coal prices that it was not a subsidy, ignoring the fact that the whole thing had been arranged to get the price of coal for the German producers down to world market prices, to relieve them of the inefficiency of their coal facilities, and that the German producers could not go out and get that coal elsewhere anyway because they were required to buy from Ruhrkohle, the coal producer.

Very similar are the Korean cases, where Korea has a government-owned basic steel producer, Pohang Steel or POSCO. That steel producer sells basic steel products to the finishing companies that make nails, that make wire rope, that make pipe and tube and then sell those finished products to the United States. POSCO receives substantial subsidies from the Korean Government. Those subsidies would not go directly to the pipe and tube manufacturers or directly to the nail manufacturers, but they would go instead directly to those manufacturers in terms of lower wire rod costs for the nail producer—wire rod is 70 percent of the cost of producing the nail—lower cost semifinished rounds to the pipe and tube exporter.

Again, Commerce refused to countervail against these subsidies that were indirectly given, because they were upstream subsidies. The reason given was—and the one I will cite is the nail case—that Commerce found that the nail producers imported approximately 1 percent of their wire rod supply from an outside source, which of course had to meet the POSCO low wire rod price. And the Commerce Department said well, that just shows that the POSCO price, even though it may be below cost, even though it may be artificially low, is no lower than other available prices, ignoring that those are not really available prices; that the alternative sources represented only 1 percent of the total wire rod supply, and, of course, such alternative producers would have to meet the POSCO price.

What is happening here, I think, is fairly clear. It is that the Commerce Department is unwilling to go upstream and will bend over backward to avoid going upstream. I have heard it said—I cannot confirm that it is true—but I have heard it said that this is out of fear that countervailing against upstream subsidies would jeopardize U.S. exports of oil-derived chemicals and fibers. Certainly a statute could be devised, however, which would allow us to countervail in the clear cases of German coal and Korean nails, but which would leave untouched—it would not frustrate—our exports of oil-based products. Our so-called oil subsidy is really a generally applicable lower price of oil which affects the entire economy. It is not industry-specific. And certainly it is a very different matter from the industry-specific benefits which I have discussed, and can be treated differently under our laws.

I have suggested in my testimony that a three-part criterion should be applied, that Commerce should be required by statute to countervail an upstream subsidy, first, where the subsidy results in the charging to the exporter of a price lower than would have been charged absent the subsidy; second, where the price charged to the exporter is lower than the price at which the item in question is freely available to that exporter in that country in the same or larger quantities and with the same or better quality and terms; and third, where the subsidy is not of general applicability but rather benefits a specific industry or group of industries.

Regardless of whether the Congress sees fit to take that particular approach, however, I think it is imperative that the upstream subsidy issue be addressed. And if it is not addressed, I think we are going to find countries around the world, governments who are becoming more sophisticated in their understanding of U.S. trade laws, subsidizing in different ways, in upstream ways, to fit this clear loophole in our law.

Chairman GIBBONS. Let me interrupt a moment to say that your testimony is excellent, and I want to assure you that as one person I intend to try to get at that problem in this legislation this year.

Mr. CUNNINGHAM. I am delighted to hear that, sir.

Chairman GIBBONS. So pour it on.

Mr. CUNNINGHAM. I am delighted to hear that, sir.

I think that it is not necessary to be overly Draconian here. I would suggest that we go only one step upstream, for example, initially. If, for example, there is seller A who sells to company B which then sells to company C which then sells to the exporter, I can understand the Commerce Department saying that that is a maze we do not want to get into. That is not what is happening, however.

Chairman **Gibbons**. It can be just a paper maze with no substance to it.

Mr. **Cunningham**. That is right. There are practical problems here. I would be the last to deny that.

Chairman **Gibbons**. Yes, I understand that.

Mr. **Cunningham**. But we certainly can deal with them in an artfully contrived statute. I would be delighted to work with the staff in any way I can to help you.

Chairman **Gibbons**. We will invite your cooperation.

Mr. **Cunningham**. I am not going to deal in my oral testimony, unless the committee would like to ask questions, with my views on nonmarket economy imports where I made some specific suggestions.

Chairman **Gibbons**. I would like to have those. You are obviously a well-qualified witness, and I would like to listen to you on that.

Mr. **Cunningham**. Well, I have an approach to nonmarket imports or a view of nonmarket economy imports which some of my fellow practitioners have characterized as a "fair rules of the game" approach. And some of them say what we need is an injury-based approach.

I disagree with that. The problem of nonmarket economy imports is that application of laws based on the assumption that a producer has real costs and real prices is impossible when we deal with imports from a company whose prices and costs are either set by or drastically affected by pervasive Government intervention in the economy.

Nevertheless, we do have a situation where U.S. producers may be doing everything we want an American company to do in terms of becoming more efficient, in terms of reducing its costs, yet be undersold by a producer who, because of Government intervention, doesn't have to pay attention to costs and prices, or to profits.

There is, in my view, no realistic way to measure costs and prices in a Communist country, and the approach which the law currently takes—to look at surrogate producers and hypothetical plants in countries where the product is in fact not produced—seems to be an exercise in fantasy. It certainly does not set clear rules for the foreign exporter, nor does it enable the U.S. industry to decide whether it has a good case to bring or not.

I think we need a rule which establishes a clear pricing standard. I think we also need a rule which gives the foreign exporter an ability—that is, a Communist country exporter—an ability to sell in the United States provided it does not sell at a price which we can clearly say that no free market exporter can meet.

Now, I support Senator Heinz' bill for those reasons. It is in my view a liberal trade bill. It gives the Communist country the benefit of the doubt. It says, you can sell in the United States if you do not undercut the price of the lowest priced imports from a free market producer who sells here in substantial quantities. Yet that bill, I can say unequivocally from many years of practice in a number of nonmarket economy cases, would provide more—and certainly more certain—relief for U.S. producers than any weapon now in the arsenal of U.S. trade laws applicable to Communist countries.

In particular, I would hope that this committee would not be influenced to concentrate on discretionary remedies such as the current section 406 as a remedy for imports from Communist countries. I was involved in the largest of the section 406 cases, the Russian ammonia case. The producers of ammonia will be testifying here later on today. We disagreed about many things in that case, but one thing I can assure you that we agree on is that section 406 is a nightmare where no one can ever be sure how the case is going to turn out, because the politics, both domestic and international, overwhelm all merits in the case.

I hope that the committee will not go that way, but will instead seek to establish a liberal but clear standard of pricing, because it is pricing that is the problem with imports from nonmarket economies.

Chairman GIBBONS. Would you have as a trigger of that injury——

Mr. CUNNINGHAM. I think it should be set up so that there would be a clear injury test. I do not think you could simply have a pricing standard which is applicable even though there is no injurious impact on a U.S. industry. I think you must have an injury test. I think it should be conceptually like the antidumping and countervailing duty law, except that the test of pricing must necessarily be different.

The other area in my testimony that I had not planned to cover today, but again I could answer questions on, is the escape clause, where we have just finished a case for Harley-Davidson and have gone through all of the agonies which I can assure you a practitioner goes through in the escape clause.

I was encouraged by that case. I think, however, it would be a mistake to read too much into it as a major turning point in escape clause policy at the administration level, although I will say this: I do think that the Harley-Davidson case, motorcycles, suggests, and I hope the suggestion is true, that this administration is amenable to granting relief in escape clause cases where there is a strong program by the domestic industry which can make that industry competitive after the temporary import relief has expired.

I think that is where escape clause needs to be aimed, and if the Harley-Davidson case points that way, and I think it may well point that way, I think that it is a very constructive turn in U.S. escape clause policy.

[The prepared statement follows:]

STATEMENT OF RICHARD O. CUNNINGHAM

Summary

The purpose of this testimony is to call attention to the following areas in which current U.S. trade laws are ineffective in providing relief to U.S. industries:

I. SECTION 301

The current statute simply does not work, for two reasons. First, the Administration in certain important cases—notably the specialty steel industry's case against subsidized European imports and the carbon steel industry's case alleging an agreement between the EC and Japan on steel volume—has been unwilling to take effective action. Second, where important cases have been taken to the GATT—most significantly in the area of EC agricultural subsidies—the GATT dispute resolution procedures have proven ineffective.

I therefore urge that the President's discretion in these cases be limited. Where the USTR investigation concludes that a violation has occurred and that U.S. producers have been adversely impacted by that violation, the President should be required to impose tariff or quantitative limitation sanctions unless he determines that the national interest of the United States would be adversely affected by such actions. The President should, however, be given the authority to suspend the sanctions pending negotiations with the relevant foreign countries or pending the conclusion of GATT dispute resolution proceedings, provided the President determines that such suspension will not materially worsen the competitive position of affected U.S. companies.

II. ANTIDUMPING AND COUNTERVAILING DUTIES

These laws are, in the main, working fairly well. However, several problems call for legislative attention:

A. Nonmarket economy imports.—Cannot be dealt with effectively under present laws. Where exporters from such radically different economic systems sell in the U.S. market, it is necessary to impose an arbitrary pricing standard of some sort. The standard set forth in Senator Heinz's legislation—the lowest price at which market economy imports are sold in the U.S.—is one which is liberal enough to allow active trade with the socialist world, yet it would greatly increase the protection available to affected U.S. industries.

B. Protective orders.—Have greatly increased the ability of petitioners to participate effectively in the investigative process, but argumentation over the issuance and terms of each order often unjustifiably snarls the process. The following reforms are needed:

1. Commerce should publish a standard protective order form, together with detailed rules and criteria for the release of data under such orders.
2. Each person submitting information should submit, along with that information, any proposed variation from the standard form or criteria.
3. All protective order issues would be resolved within 21 days after submission of the data.
4. In-house counsel should be granted access to data under protective order.

C. Upstream subsidies.—Are not effectively reached under present law. The countervailing duty law should be amended to provide that subsidies given to firms which sell directly to an exporter are countervailable where:

1. The subsidy results in the charging to the exporter of a price lower than would have been charged absent the subsidy, and
2. The price charged to the exporter is lower than the price at which the item in question is freely available to that exporter in that country in the same or larger quantities and with the same or better quality and terms, and
3. The subsidy is not of general applicability, but rather benefits a specific industry or group of industries.

III. SECTION 201—THE ESCAPE CLAUSE

It is my hope that the recent decisions by the ITC and the President in Heavyweight Motorcycles represent a major change in the effectiveness of this statute. A majority of present ITC Commissioners now apear to reject the "recession as a single cause" analysis which led to the negative decision in the automobile case. The President's acceptance of the Commission's duty recommendation suggests that this administration may be willing to grant relief in those cases where the petitioning industry has a credible program to become fully compentititive with the imports. It does not mean that an industry which is seriously injured by imports, but which does not have a program which promises to achieve full competitiveness, can obtain relief. Congress should consider whether it wishes the escape clause to be applicable to the latter situation.

Statement

My name is Richard O. Cunningham. I am a member of the Washington law firm of Steptoe & Johnson, Chartered, where I have practiced international law for more than fifteen years. During that period, I have both prosecuted and defended cases under the antidumping and countervailing duty laws and under sections 201, 301 and 406.

As this Committee is aware from previous testimony I have given, I feel strongly that the laws dealing with unfair import practices—the antidumping and countervailing duty laws and section 301—should be enforced impartially and nonpolitically, and that effective relief should be given wherever the unfair practice is found to have injured U.S. producers.

With respect to the escape clause, I feel that it should be used sparingly. U.S. industries which are undertaking effective programs to achieve competitiveness should be able to obtain temporary relief while they complete those programs. There is an open policy issue as to whether temporary protection should be given to major cyclical industries where the unemployment consequences of import surges are high, but where there is no question of programs to achieve cost competitiveness. In no event, however, should this statute become a generalized vehicle for protection of declining industries.

Finally, let me briefly reiterate my view on Section 406 of the Trade Act of 1974. It should be repealed. The result of any case under that statute depends 99 percent on political ideology and diplomatic considerations and only 1 percent on merits. Moreover, the law has proven totally ineffective as a vehicle for U.S. industries seeking relief from communist country imports. Anyone favoring the retention of this statute should be required to prosecute or defend a case under it with no assistance from tranquilizers, ulcer specialists or psychiatric counselling.

With these general viewpoints in mind, let me turn to some specific areas in which statutory revisions should be considered. Of these, the most pressing need is that real teeth can be put into Section 301.

I. SECTION 301

This statute should be given top priority in the arsenal of U.S. trade remedies for unfair foreign practices. Four years ago, the Carter Administration persuaded Congress to approve some of the most sweeping trade concessions in U.S. history—including major duty reductions—by emphasizing that our GATT trading partners had agreed to comprehensive codes of fair conduct in international trade. There was a good deal of skepticism at that time over whether there would be any effective means of enforcing those fine-sounding codes. The Administration's answer—loud and clear—was that Section 301 created a viable method of enforcement and that it would be applied vigorously. Things have not turned out that way.

As it now stands, Section 301 is proving to be totally ineffective as a vehicle for enforcement of U.S. rights under GATT in the most important single area—foreign government subsidies. The foreign countries against whom cases have been directed obviously view Section 301 as no threat whatsoever. This is readily apparent from even the most cursory examiniation of the two main efforts which our government has launched to utilize this statute as a vehicle for enforcement of the Codes.

First, we have a series of cases aimed at the Common Agricultural Policy of the European Community. These include wheat flour, pasta, citrus fruits and several other products. The cases are obviously well-founded, since the CAP is a blatant combination of subsidies, export promotion, and import restrictions. Yet all of these cases are failing miserably. Recent testimony to that failure lies in the U.S. decision to "fight fire with fire" rather than relying on the Section 301 proceedings, as exemplified by the use of U.S. subsidies to take the Egyptian wheat flour market away from the Europeans.

Second, the section 301 case challenging subsidized exports of European specialty steels has proven equally ineffective. At the end to the investigation, the U.S. Trade Representative grandly announced that it had concluded as a result of its studies that European specialty steel exports are subsidized and that those subsidized exports to the U.S. are injuring the American specialty steel industry. However, instead of imposing sanctions or even taking the case to the GATT, the decision was made to initiate a Section 201 "escape clause" case as a vehicle for eventually placing quotas on imports of specialty steel from Europe (and, it might be added, from all other sources as well). This is a terrible trade law precedent. It constitutes nothing more nor less than a confession that Section 301 does not work. And, from the standpoint of the domestic industry, it postponed relief for at least six more months. During this time at least two specialty steel producers have gone out of the business.

Nor is the problem limited to Section 301 cases brought under the GATT Subsidies Code, The Code on Government Procurement has provided very little in the way of benefit to U.S. producers, in part because Section 301 proceedings do not perform anything like the function of a bid protest under U.S. procurement law. And in the recent case brought against Japan by the American Iron & Steel Institute, the Administration was unwilling to negotiate quantitative restrictions even where it agreed that the EC-Japan agreement alleged in the petition did in fact exist.

The problem with Section 301 is that the Administration has been unwilling to take action which would be vigorous enough to convince our trading partners that we mean business about enforcing fair trade. In my view, what is needed in most cases is the unilateral imposition of sanctions by the United States when the USTR's investigation concludes that the alleged violation has in fact incurred and that U.S. companies have been adversely impacted. The President has the authority to impose such sanctions under present law, but the Administration is obivously unwilling to invoke that authority. If Section 301 is to remain on the books, what is needed is a limitation of the President's discretion—a statutory enumeration of criteria which he must apply and, if the criteria are satisfied, a requirement that he impose certain specified types of sanctions. I propose the following:

1. Where the USTR investigation concludes that an unfair practice has occurred which adversely impacts a U.S. industry, the President should be required to impose tariffs or quantitative restrictions on imports from the offending country, unless he specifically finds that this would be contrary to important national interests of the United States.

2. At the same time, the President should be required to initiate a GATT dispute resolution proceeding or to commence negotiations with the foreign government.

3. The President should have authority to suspend the tariffs or quantitative restrictions pending the outcome of the GATT proceeding or the negotiations, provided he determines that such suspension will not materially worsen the competitive position of the affected U.S. companies. In addition, a suspension during bilateral negotiations should be limited to 90 days duration.

4. Where a GATT proceeding ends in a negative decision, the previously-ordered import restrictions whould be lifted, and the President would have 90 days to determine which of the following actions to take:

(a) re-impose the import restrictions and enter into compensation negotiations with the affected foreign government;

(b) provide assistance to the affected U.S. industsry to compensate for the failure to obtain relief; or

(c) institute proceedings under another trade statute.

It is essential that the President not have the option of simply doing nothing in the event the GATT proceeding and/or negotiations fail. If U.S. industires are to be left with no remedy even after the USTR has found injurious unfair practices, foreign governments will continue to give no credibility to Section 301 and the GATT Codes will be increasingly ineffective.

II. ANTIDUMPING AND COUNTERVAILING DUTY LAWS

At the outset, it should be noted that the investigative processes of the Department of Commerce and International Trade Commission have dramatically improved in the last two years. Investigations are now more thorough, questionnaires more detailed, and the use of in-house accountants has produced much more reliable data. The improvement is especially marked at the Department of Commerce, where investigators now regularly travel to the foreign country from Washington to perform the verification of questionnaire responses—a function formerly handled in an often slipshod fashion by Embassy personnel in the country from which the exports emanate. Finally, the use of protective order procedures has enabled counsel for petitioning U.S. industries to be of substantial assistance to the Department in its investigations.

Nevertheless, there remain some serious problems areas in the enforcement of these laws.

A. Determination of fair value in nonmarket economy cases

At present, the antidumping law is not applied in any meaningful manner to imports from communist countries (so-called "non-market economies" of "state-controlled-economy countries"). The Commerce Department has been following regulations adopted under the old Treasury Department regime, which produces totally unpredictable results unrelated to any economic reality. In essence, Commerce seeks to base fair value on prices charged by a producer of the same product in a country whose stage of economic development is deemed to be equivalent to that of the communist country. This analysis of comparable level of economic development is a wholly illusory exercise. Moreover, the Department has the option of declaring that there is no producer located in a country of comparable economic development, at which point it enters into a phantasmagorical "analysis" of what it would cost to produce that merchandise in some country deemed to be comparable in economic development to the communist country, even though such merchandise is not in fact produced in that country!

The consequences of these provisions have been as follows. First, very few cases are leading to meaningful relief from communist country imports. Second, a petitioning U.S. industy has no way of determining in advance whether it has a meritorious case. Third, the foreing exporter has no way of determining at what price he should sell his merchandise in the United States without violating the antidumping law. And finally, the Department is free to reach almost any result in a given case, and thus can mold the result to the diplomatic and/or political necessities which it may perceive at the time.

What is needed is a clear and objective standard, even if that standard is an artificial one. The nature of imports from communist countries, in fact, makes it necessary to invoke an artificial criterion. There is simply no way of determining accurately the prices and costs of transactions in a non-market system. The legislation introduced last year by Senator Heinz seems to be a reasonable attempt to develop such an objective standard. Under the Heinz bill, imports from non-market economy countries would be held to be unfairly priced if they were sold in the United States at a price lower than that of the lowest-priced imports from free market countries. Enactment of such legislation would provide predictability of results, improve the chances of U.S. industries for obtaining relief, yet at the same time provide a relatively liberal opportunity for nonmarket economy producers to export to the United States.

B. Protective order rules

The protective order concept has been a major step forward in the enforcement of these laws, noted above. However, two serious problems have arisen.

First, the Department of Commerce and the International Trade Commission have refused to permit in-house counsel to obtain access to data under protective order. The consequence of this interpretation is that a company which wishes to bring a case using its own in-house counsel is disadvantaged, and may even be forced to hire outside counsel at substantial expense. In view of the high cost of anitdumping and countervailing duty proceedings, this rule is unfair and should be reversed by legislation which clearly requires the disclosure of protective order data to inhouse attorneys.

The second problem is that disputes over the availability and form of protective orders are consuming preposterous amounts of time and effort, and are delaying the disclosure of information to petitioners' counsel. In view of the tight time limits imposed on Commerce's investigations,[1] such a delay works greatly to petitioners' disadvantage. To deal with this problem:

1. Commerce should publish a standard protective order form, together with detailed rules and criteria for the release of data under such orders.
2. Each person submitting information should submit, along with that information, any proposed variation from the standard form or criteria.
3. All protective order issues would be resolved within 21 days after submission of the data.

C. Upstream subsidies

In a series of cases decided over the past year, involving European steel, Korean nails and other products, the Department of Commerce has bent over backward to avoid imposing countervailing duties for so-called "upstream" subsidies. In order to understand this issue, consider the following situation. The Government of Korea gives subsidies to a producer of wire rod. The wire rod is not itself exported, but is instead sold to producers of nails at a price which is artificially low because of the subsidies received by the wire rod producer. The nail producers then make the wire rod into nails (note that wire rod represents 70 percent of the cost of the average nail) and exports the nails to the United States. The price of the nails is thus artificially low, not because of subsidies given to the nail producers, but rather because of "upstream" subsidies given to the wire rod producer.

Over and over again, Commerce has sought ways to avoid countervailing against such "upstream" subsidies. This reluctance to countervail is presumably attributable to Commerce's desire not to endanger U.S. exports of petrochemicals and petroleum-based fibers which have been alleged to benefit unfairly from the exporters' ability to buy petroleum at prices which are below world levels because of U.S. Government policies.

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[1] As I have stated on numerous previous occasions, those tight time limits work to the disadvantage of petitioners, because when Commerce does not have time to develop the facts fully and to refute contentions advanced by the foreign exporter, the likelihood is that they will err on the side of greater leniency.

This consideration need not prevent the application of countervailing duties to imports of German steel, Korean nails and the like. A statutory provision could be narrowly written in such a way as to exclude from the definition of an "upstream" subsidy any program of general applicability, as opposed to programs directed to specific industries. I suggest that Commerce be required to impose countervailing duties to offset subsidies given to a firm which sells directly to the exporter [2] where

1. The subsidy results in the charging to the exporter of a price lower than would have been charged absent the subsidy, and
2. The price charged to the exporter is lower than the price at which the item is freely available to that exporter in that country in the same or larger quantities and with the same or better quality and terms, and
3. The sudsidy is not of general applicability, but rather benefits a specific industry or group of industries or a specific geographic area.

III. SECTION 201—THE ESCAPE CLAUSE

In counselling clients seeking relief from imports, I have always been extemely reluctant to recommend proceeding under the escape clause. One reason is the historic reluctance of both Republican and Democratic Presidents to order import relief, even where the petitioning industry was planning major changes to become competitive with imports. Secondly, the ITC's interpretation of the causation standard in the 1980 *Motor Vehicles* case—where the Commission looked at "the recession" as a single cause and not surprisingly found it to be a greater cause of injury than the increased imports—made it very difficult even to get past the initial hurdle in a case brought during an economic downturn.

Nevertheless, I have finished prosecuting a Section 201 case on heavyweight motorcycle imports. I recommend that Harley-Davidson Motor Company bring that case for two reasons:

First, we had an unusually strong case of injury and "substantial cause", with the numbers being such that loss of sales imports substantially exceeded any decline in market demand.

Second, Harley-Davidson not only had an extremely impressive program to make itself competitive with the Japanese, it had already made substantial progress in implementing that program. Indeed, Harley had already reduced it break-even point by 40% when the surge of Japanese imports forced a suspension of most of Harley's programs.

As the Committee knows, the ITC recommended five years of increased duties beginning at 45 percent, and the President accepted that recommendation with only minor modification. I find this result highly encouraging as a possible turning point in escape clause policy, both at the ITC phase and at the Presidential review level.

In the Commission's decision, Chairmand Eckes and Commissioner Haggart appear to have rejected the recession-as-a-single-cause analysis used in the automobile case. I would hope that the Senate Finance Committee, in confirmation hearings on the three new Commission nominees, will inquire closely as to their positions on this critical issue. If, however, it appears that the Commission might return to it previous interpretation, I would favor amending the statute by inserting a specific prohibition against considering a recession or a decline in demand as a specific "cause" of injury. I do not favor an elimination or reduction of the "substantial cause" criterion.

The President's acceptance of the ITC relief recommendation—the first time that has happened—is, in my mind, even more encouraging for supporters of an effective escape clause. As we argued the case in the interagency review process, it was clear to me that the factor which was most influential in our favor was Harley-Davidson's impressive competitiveness program and the likelihood that Harley could become fully competitive with the Japanese when relief expires in five years. I hope that the decision in our case signals that an industry with a credible, effective competitiveness program can obtain relief under Section 201.

There is no evidence, however, that the escape clause can provide relief for an industy—even an important one with large employment—which is being seriously injured by increasing imports, but which cannot claim to have programs which will make it fully competitive after relief expires. The Committee would do well to consider whether it wants the escape clause to cover that situation as well.

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[2] I.e., this proposal would take only one step "upstream", and would not reach a subsidy given to firm A, which reduces its price to firm B, which thus is able to reduce its price to the exporter. To go more than one step upsteam would greatly exacerbate the administrative difficulties. I would therefore urge initial legislation limited to one step upstream, addressing the issue of further steps if it proves necessary to do so.

Chairman GIBBONS. Mr. Cunningham, I am going to read your testimony. I appreciate your coming here to help us with this problem.

Do you think that there is any way of getting at the targeting problems we are running into with Japan and with other countries through our countervailing duty law?

Mr. CUNNINGHAM. Parts of them I think we can. I do not think that the countervailing duty law is well equipped to deal with protection of the foreign producers by sheltering the market through import restraints—in other words, where they are sheltered in their early years of development.

Chairman GIBBONS. Yes, I understand that. That is a subsidy of a sort. It is a subsidy by excluding someone from the market.

Mr. CUNNINGHAM. It is indeed.

I despair of success in the effort to prove to the Commerce Department what the amount of that subsidy is, however.

Chairman GIBBONS. We are going to get around to that in a few minutes.

Let me tackle it right now. You know we have moved the countervailing duty laws out of Treasury, after almost a century of no progress, and we have put them over in Commerce and they seem to be operating a little better. But I am still worried that there is more political influence, and I do not mean political influence in a who-knows-who type of way, but from the top in our Government from the State Department and from other agencies than there ought to be.

I cannot prove it. I just feel it. I am thinking about moving the unfair practices dumping and countervailing duty cases, out of commerce and putting them in an agency that is more isolated from political influence—something akin to the International Trade Commission.

I do not want to jump to any conclusions about Commerce's enforcement of these laws, but we have agreed that subsidies are unfair trade practices. We have agreed to this almost 100 years in this country, and we have agreed to it under the GATT and under the Subsidies Code for a long, long time, and yet we do not seem to be getting effective enforcement of those laws against the subsidizers.

I am trying to find ways of making those laws more effective within the framework of the General Agreement on Tariffs and Trade.

Mr. CUNNINGHAM. I am torn in my views on that particular——

Chairman GIBBONS. It tears me, too, but go ahead. I would like to hear you rip a little while.

Mr. CUNNINGHAM. I am torn, because over the past 2 or 3 years there has been such marked improvement in the enforcement of the antidumping and countervailing duty laws.

Chairman GIBBONS. Agreed.

Mr. CUNNINGHAM. And I guess I am inclined to the view that one ought to wait just a bit and see if that improvement continues, perhaps nudge them a bit to continue. But on the other hand, it is certainly true, and it is particular true in the big cases, that there are those in this and any administration who say—and it is not an unrespectable position—that where a case is so big that it has a substantial effect on the economy and on our international relations that we have to be creative—and I say that with a somewhat sinister tone deliberately—in looking for a solution to those problems.

I would also say, however, though, that many U.S. industries want those creative solutions. It has always been my view—and having talked rather tough on steel a moment ago, let me turn it around a bit—it has always been my view that the steel cases last year were aimed by the industry at getting a quantitative negotiated solution, rather than at really getting those antidumping and countervailing duties. That is a personal view and nobody in the U.S. industry has ever said it to me.

Chairman GIBBONS. I agree with you there, and I have told the steel industry that. They disagree. But I am not real sure about that.

Mr. CUNNINGHAM. I think they must. I think one cannot say that, well, we brought these cases but we really did not bring them to get the relief under the statute, we brought them to get something else. One cannot say that.

Chairman GIBBONS. We are already beginning to see some interesting downstream injury to other American industries because of the settlement of that steel case. Mr. Krist follows you. I have to ask him some questions about that. We already have petitioners before this committee suggesting we change the law because of the way the steel settlement has impacted their particular segment of the steel industry and some things downstream from that.

Mr. CUNNINGHAM. I guess, to return to the point of taking it out of the Commerce Department and putting it in an independent agency, I would be more inclined myself to try to deal with the specific areas, such as upstream subsidies, where policy considerations appear to have produced distortions in the law, rather than, at this time at any rate, taking it out of Commerce and putting it somewhere else.

Chairman GIBBONS. Well, when we get through reorganizing the trade functions no one may recognize anything, after we get all the furniture shuffled around, if we ever do.

Mr. CUNNINGHAM. I confess I have not got that reorganization quite straightened out in my head.

Chairman GIBBONS. You are not out of step. Neither does anybody else.

Mr. CUNNINGHAM. I will say one thing on that, however. And this is again a view that I have coming out of the steel cases last year: that there is a strong argument to be made for a single trade policy entity within the Government. There were some real stresses in the steel cases between the Commerce Department and a number of other agencies in the Government, which I think hampered the processing of those cases.

Chairman GIBBONS. Well, these stresses are natural. Were the stresses good or bad in the final outcome?

Mr. CUNNINGHAM. I think they were bad. I think they were bad because in a big case like that there is an opportunity—let me revise that—there is a temptation for the foreign producers in the case to try to play one trade agency off against the other. It is not often that one can be successful in doing that. There was close to a success last year in the steel cases.

Chairman GIBBONS. Well, you have made some very good suggestions here. I am going to turn you over to Mr. Schulze now.

Mr. SCHULZE. Thank you, Mr. Chairman.

I agree that your testimony has been most valuable and we thank you. The longer these hearings go on, the more my mind and emotions are being pushed in the direction of a Department of Trade with some form of relatively strong reciprocity powers.

Do you have any thoughts on that?

Mr. CUNNINGHAM. I am glad you mentioned that, because it is a point that I had wanted to make in response to Mr. Gibbons' raising of the targeting issue. I think we ought to do two things. I think we ought to make the countervailing duty and dumping laws as strong and nondiscretionary as possible.

But I also think we must realize that the world is becoming a very complicated place in terms of trade. The antidumping and countervailing duty laws are never going to deal effectively, in my view, with foreign cartelization, nor are the U.S. antitrust laws actually, nor will they deal with sheltering of foreign industries from imports in their early years. Nor can they really deal effectively, I think, with preferential procurement practices abroad and with the infinite variations in use of standards and customs classifications to protect industries and to foster industries and to give them an unfair advantage.

And the more I think about that, the more I do think that reciprocity in some form or other is going to have to be the answer. I think that the difficult question, the terribly difficult question there, is how much discretion must you have in a reciprocity statute?

It seems to me that a reciprocity statute has to, if it is to be effective, allow the U.S. Government, where it sees a case of unfairness that is not addressable under any of the laws that I have just mentioned, to take reciprocal action. But the issues are complicated enough, and I think we know little enough about them, that I would be loathe to require in all cases that the President take action.

But I think, on targeting particularly, whatever that means, it certainly means a complicated set of nontraditional ways of fostering a particular industry which gives that industry a competitive advantage over U.S. industries. In dealing with that sort of thing, we have to have a flexible statute, and I think reciprocity is the only way to get at it for the long run.

Mr. SCHULZE. I thank you for that answer.

It seems to me that we are spending an awful lot of time talking about symptoms, and they are extremely complicated. And we have got to give somebody the opportunity to use discretion and some common sense and say to a foreign nation, you are out of line and automatically we are going to impose something, a tariff or a surcharge. Or perhaps it should stay away from calling it a penalty, but just to try to keep some sort of a level playing field.

I think your point is well taken on a little more force in the imposition of remedies, and with the President having only the discretion to say, halt, this is not in the national interest. And quite frankly, if we do some of these things I am of the opinion that many of the smaller problems will go away. If a foreign nation or exporter is aware that we have mechanisms to level the playing field and that they will be used, our problems will diminish greatly. So perhaps we can head in that direction.

I again thank you for your testimony.

Mr. CUNNINGHAM. I hope we can head in that direction, Congressman.

Chairman GIBBONS. Let me ask you, Mr. Cunningham, on the reciprocity proposal, would you limit reciprocity just to unfair trade practices as a start? Because, if you open up reciprocity to everything, I do not know whether you might have created more problems than you have solved.

Mr. CUNNINGHAM. Well, there is a Pandora's box problem here, I agree with that. You and I might differ, I and Mr. Schulze might differ, when we say unfair trade practices, what that means.

Chairman GIBBONS. I am speaking generally about subsidies and dumping.

Mr. CUNNINGHAM. No, I would not, I would not limit it to that, because I really think that if we are going to get at targeting, I do not think it is subsidies or dumping. That is not the problem we are talking about. If we are saying that we need reciprocity to get at targeting—and I think we do—then we have to define reciprocity, we have to define unfair practices, more broadly than that.

Chairman GIBBONS. What would prevent us from defining in the statute that the protection of markets and the preferential purchasing practices are subsidies? We could define it in the statute.

Mr. CUNNINGHAM. I would wholeheartedly endorse that. It may be that eventually, because of the complexity of the world, we will have to have some sort of generalized reciprocity statute. I would hope that we would not take that step immediately. I hope that we would feel our way cautiously in this area.

Chairman GIBBONS. Well, that is the reason why I said, would it not be a good idea to limit reciprocity to the unfair trade practices?

Mr. CUNNINGHAM. Right, but define the unfair trade practices.

Chairman GIBBONS. Yes, and I would define in the unfair trade practices as a part of the countervailing operation such things as artificially insulating the market during development stages, preferential purchasing arrangements within the country, subsidized loans to a group of companies or a company developing a product—all of those things that are not generally available.

I do not know why we could not define in the countervailing duty statute those things as being subsidies. They are subsidies in my mind. I do not know why we could not classify them as subsidies.

Mr. CUNNINGHAM. Well, if you defined them as subsidies and deal with them through the countervailing duty statute, the remedy that you get is a duty to be imposed. Putting aside for a moment the quantification problems and the like, one of the things that you are not dealing with there is competition in export markets.

Chairman GIBBONS. Yes, in third markets. I realize that that is not an adequate solution, and that is where we have to find some better mechanism.

Mr. SCHULZE. If the gentleman would yield.

Chairman GIBBONS. Yes, I would be happy to yield to my friend.

Mr. SCHULZE. Along this same line, somewhere we have got to allow some discretion and perhaps use the term "threat" rather than "injury," and just sort of feel our way along. We all would like to see utopia, but you are right, we have got to crawl before we can walk.

But I think that if we do progress in that direction we can cut off a lot of the problems that are going to be popping up over the horizon, and perhaps make our job and Trade and STR and Commerce and the rest of them, make their jobs all a lot easier.

Mr. CUNNINGHAM. Could I interject one specific point here in this discussion, because I think it is an important one. And it has to do with the preferential procurement issue. I was involved in the work leading up to the negotiation of the procurement code. One of the main movers for that was the domestic electrical equipment industry, which is foreclosed from most foreign markets for power transformers and steam turbine generators and the like.

And we got a procurement code, but it was a code in which each foreign country was allowed to exempt whatever, literally whatever, purchasing agencies they wanted to exempt. And everybody around the world exempted their utilities, the national utilities, from the requirements of the code.

We have got a situation in the world right now where that particular industry is at a crucial juncture, where they have had a decade of lean years in the purchasing of power and transmission equipment. The U.S. market now is starting to turn up. Foreign producers around the world are going to be jumping into that U.S. market and trying to get it, and doing it from the base of totally protected home markets.

It is a major economic situation which we are going to have to be careful to deal with, and I would hope that in addition to one clear remedy, which is effective antidumping enforcement in that area, that we would also make whatever effort we think is appropriate to get at those discriminatory procurement policies of foreign governments, which are now exempt under the GATT procurement code.

Chairman GIBBONS. Good point.

Well, we have a vote on, unfortunately, and it is a rather important vote. Maybe we had better break at this time. We appreciate your coming here today and working with us. We invite you to continue working with us.

Mr. CUNNINGHAM. I would be delighted to do so, and thank you for giving me the time to state my views.

Chairman GIBBONS. Thank you.

[Recess.]

Chairman GIBBONS. Our first witness is Mr. Gottschalk.

STATEMENT OF ROBERT M. GOTTSCHALK, NEW YORK, N.Y.

Mr. GOTTSCHALK. Thank you, Mr. Chairman. Thank you for the opportunity of being here.

My name is Robert Gottschalk. I am a partner in the law firm of Robert M. Gottschalk. I have been engaged in the practice of trade law for approximately 30 years and have had the opportunity of gaining some experience which I hope will be relevant to your subject of inquiry.

In the steel battles, I have been representing European companies since 1971, when the first actions were brought against stainless steel wire rod. So I have been able not only to have had the experience of working with the Treasury Department, but also with the Commerce Department, and to see the difference between the two and perhaps to discuss this difference as part of a very brief presentation so as not to overtax your very heavy schedule.

I think it is important to take a look at practice under our countervailing and our antidumping statutes and I am going to start at the very beginning which is the bringing of a complaint.

The reason the system does not necessarily work well in facilitating the initiation of proceedings derives from the basic fact that the trade statutes are not nationally well known. The bar itself, the attorneys, are very much responsible for this. When we discuss the extremely high fees of attorneys in this field, it stems in part from a lack of competition. If attorneys throughout the country carried out their obligations properly, they would know as part of their equipment and their preparation for their clients in every city in this country what the trade laws are and that they, as counsel, have as a responsibility to bring for their domestic clients the actions that are necessary to protect them.

The fact is, that there is a pervasive ignorance throughout the country. We can get this message across through the bar associations and it can certainly be done by the Department of Commerce through lectures throughout the country, or by the Small Business Administration or other agencies.

But that is one of the major failures across this country. The small company in Toledo, Ohio, finding itself the subject of some unfair trade practices, does not even have a local consultant who will know what the trade laws are about. So before we get to changing the statutes, we really have to look at some of the inherent problems as we face them under the existing statutes.

The burden of preparing the petition is not an overwhelming one under the current statutes. We had a recent decision which clearly laid out the obligations of Commerce to assist in the preparation of a petition.

This is quite important. Once the current statutes are better known, and it is understood that a petition, which initiates the investigatory efforts of the U.S. Government, can be prepared relatively simply, relatively inexpensively, and with the assistance of the U.S. Government, we will have taken one of the major steps to making these laws more effective.

This is an area of ignorance which can be cured. If it is cured and done properly, the existing legislation will be understood to be quite good.

Suggestions have been made about transferring the process from the Department of Commerce to another agency. I will give you my experience with the transfer from Treasury to Commerce. It was not overwhelmingly favorable because in effect the same people came over from one department to the other. If you now transfer it to a third agency, we may see exactly the same phenomenon. You may simply be emptying out a whole section of the Department of Commerce and moving it to another agency which will have another name.

I think the Commerce Department may also have been vilified improperly as a result of policy decisions which were made which were extrinsic to the Commerce Department. The steel cases, clearly were among the major cases of the last 20 or 30 years. Yet the Commerce Department's actions in those cases were made invisible by a subsequent agreement which many of us in the trade field felt was inevitable, but flawed for many reasons.

We have to keep in mind, however, that prior to that agreement the Commerce Department had done a superb job. Remember I was on the other side of the table, defending the cases. In the countervailing duty cases, findings of substantial margins of subsidies had been made by the Commerce Department and were ready to be put into final form. Moreover, injury would have been found and duties would have been applied.

On the antidumping side, substantial margins of dumping had been found against a number of industries and a number of countries, which also would have been reflected in increased tariffs which would now be visible in their effect and their impact.

But what happened in effect was that an agreement was concluded and the Commerce Department became invisible as to the effort it had made over a very long period of time. Moreover, this was the third time this had happened and not the first.

The first series of steel cases was terminated by the first trigger price system. The second series of steel cases was terminated by the second trigger price system, and the third by the European Community agreement. In every one of these three proceedings, as I can tell you, since on the defense side we worked hard to defend them, the Commerce Department was superb in its evaluation of its role and the performance of its task. And the results for the American industry would have been highly satisfactory, if there had not been intervening agreements.

And if in fact the Commerce Department had gotten the credit for what it had achieved, the discussion of transferring it to another agency might be taking place under a different atmosphere. So while I am not a natural defender of the Commerce Department by professional position, I can tell you that it is easy to misunderstand how successful its efforts were and how capable were the staff who were involved in the proceedings.

Chairman GIBBONS. May I interrupt you there? I am not criticizing the Commerce Department for its professionalism. I am criticizing the fact that I think overriding political influence finally settled that case, and I frankly am one who wished it had been litigated out and the chips have fallen where they may.

Mr. GOTTSCHALK. Mr. Chairman, if I could give you the alternate scenario. If the case had been in another agency, the results would have been the same. The intervention came at the level of the White House.

Chairman GIBBONS. I understand that. That is exactly what I am talking about.

Mr. GOTTSCHALK. Whether these complaints had been withdrawn from a third agency or from the Commerce Department, it would have finally made no difference at all.

I agree with you. I think it was a regrettable result. But the mechanism by which it was terminated would not have changed if you had another agency.

Chairman GIBBONS. Well, I am thinking about taking some of the Presidential type of discretion out of these unfair practices, because, frankly, it does worry me the way these cases have been compromised out. I think it breeds contempt for the process and for law.

Mr. GOTTSCHALK. I agree with you. I think that the pressure for a settled solution exerted by the American industry bears an enormous responsibility in the final result.

Chairman GIBBONS. Some segments of the American steel industry.

Mr. GOTTSCHALK. I will apologize. That is a correct statement. Some segments, significant segments, from the day they filed their complaint were looking for another result than a final solution to the complaint itself. I think they were prepared for a settlement on the European front from the day they filed their complaint. And it engendered enormous cynicism, since the amount of effort required on all sides to reach that point was, to say the least, significant.

I am not sure what the cure is, because again the President and the White House or the Special Trade Representative did not act under any particular legislation. It was behind the scenes pressure which resulted in a withdrawal of the complaint. And I do not know how we can guard against that unless we make a complaint incapable of being withdrawn, which is certainly not something I am recommending.

Chairman GIBBONS. Well, we are talking now about unfair practices, ones that the Europeans have agreed to, we have agreed to, the Japanese have agreed to, all the civilized world has agreed to as being unfair practices. What worries me, if we cannot enforce the laws against unfair practices, unfair practices will continue to increase, and the whole system will finally blow itself up.

Mr. GOTTSCHALK. Maybe, Mr. Chairman, there ought to be a point of no return—that a complaint may not be withdrawn after a certain number of findings have been made. This would remove this kind of maneuvering behind the scenes to reach a result which may be very harmful to the United States.

Chairman GIBBONS. That is a good point. After a case has been made that there is subsidy, the case just has to be decided.

Mr. GOTTSCHALK. That may well be the ultimate answer.

Chairman GIBBONS. I am really looking to people like you, who have had experience in practicing this kind of law, for suggestions. And that is why I appreciate your 30 years of experience.

Put yourself in my position. I am one of those ignorant lawyers from way out in the boondocks that never had a trade case. No client ever brought one into my office. I am not sure any client I ever had ever was that influenced by a trade practice.

I am trying to sit up here making reasonable laws on a very complex matter. So we need your help, Mr. Gottschalk.

Mr. GOTTSCHALK. One of the points of view that I wanted to make as clearly as I could is that there is a misunderstanding in the community at large about trade laws in general, that on one side you have a complainant representing a domestic industry and on the other side you have the foreigners.

I think that is a totally erroneous view of our trade statutes. I feel you have Americans on both sides of the statute. If it is misread, misinterpreted, misapplied, made vengeful, made too harsh, made too arbitrary, the counterpart to benefiting the American industry is hurting the American on the other side—the transporter, the dock worker, the importer, the transformer, the final user, the seller and possibly our exports.

So my view over the 30 years is that whenever we look at trade legislation we are looking at two American concepts: how adequately and properly to protect the domestic industry; and the other one, how adequately to protect the rest of the American population against an improper result for the industry.

Looking at it as if it were a foreign other side distorts the view which we have of the legislation. Though I think the American industry should be protected against unfair trade practices, I do not think it should be protected against unfair trade practices to punish foreigners, because that is the wrong end of the horse.

Chairman GIBBONS. I agree.

Mr. GOTTSCHALK. But in balance with the other American interests.

Chairman GIBBONS. My view is that if we allow the unfair trade practices to grow by failing to enforce the laws that we have agreed to, we perhaps have created a bigger problem than we started out with.

Mr. GOTTSCHALK. Clearly.

I would like to address myself to one of the greatest flaws in the application of the trade laws as they exist today. Assume we were going down a highway in a car and a policeman stopped us and told us we had just received a speeding ticket for going over the speed limit. We asked him what the speed limit was and he said it was 50 miles an hour, and you said, but I cannot see it posted anywhere, and he said, it is not, we just decided today that it is 50 miles an hour. We would have some objection to that.

Chairman GIBBONS. Yes.

Mr. GOTTSCHALK. But in the Commerce Department, both in antidumping and particularly in countervailing proceedings nobody knows what the heck the rules of the game are. Officials make them up, often, as they go along. And this makes it impossible for foreign manufacturers who are respectful of American laws to comply with our legislation as it exists.

Chairman GIBBONS. Let me ask you a lawyer question. Is there any service that attempts to codify these, where do you do your research on things like this?

Mr. GOTTSCHALK. All of the trade cases are published, so we are able to read them. But that does not help us very much.

I will give you an example. As more fully described in our written statement, in the countervailing duty cases, changes were made by the Commerce Department in what was a countervailable subsidy, ad hoc, right there, at that time. If you do this, it is impossible for a foreign country to comply with that legislation.

There was no rulemaking, there were no hearings, there were no proposed changes. There was just a simple implementation of a change right then and there. We were told, that is what our thinking is now, and that is what we are going to do, this now is a countervailable subsidy.

This is not the proper way for us to maintain our laws. So what I am really saying is that the rules of the game by which we determine what is a sale below fair value, which the adjustments are proper in making a calculation, should be so clear that a foreign enterprise can easily comply with them.

In countervailing duty, the same predictability should exist for foreign governments. We should outline which type of government assistance given by a foreign government will be deemed to be a countervailable subsidy in advance, not later on. And if the Congress can be of assistance in doing this, in requiring at least that no changes be made without hearings by the appropriate agency, then we have half a chance of permitting countries which are sympathetic to our problem able to see what they are doing and to gage what they are doing in terms of our domestic legislation.

This is something that is lacking. Every time we have a new case and we show up at Treasury in its own time or Commerce, we cannot tell our clients what rules will be applied that time. So this is an area which requires your help.

Chairman GIBBONS. That is a lawyer-like question, but it goes to the very heart of whether our laws are workable or not. How do you suggest we do that? Should we try to make the statutes so definite—is it the problem of the statute, that it is too indefinite?

Mr. GOTTSCHALK. The question is a superb one. The answer is much more difficult. If we attempted to make the statute so precise in an area which has such fluidity to it, such as government assistance, we may either overkill or underkill. We constantly run into countries more imaginative in the countervailing duty field.

I am not an expert on legislation and its process, so I have some difficulty in advising you as an expert on how to do this.

It is clear however that the administrative agency, should be forced to publish its rules, make them clear, and not be able to change them without appropriate hearings. Now whether this is a function for legislation, I do not know.

Chairman GIBBONS. Has that ever been done in any of your 30 years of practice?

Mr. GOTTSCHALK. No.

Chairman GIBBONS. Well, how as a lawyer do you ever figure out what the rules are down there?

Mr. GOTTSCHALK. You guess them based on your last experience and pray like hell. That is all we are able to do.

And again, if we go back to our original thought that we would like to have more lawyers become familiar with this field——

Chairman GIBBONS. I agree with you there, and perhaps if the process were more lawyerlike they would become familiar with it.

They would probably just say, well, you know, that is some arcane practice and I will only have one of these cases in a lifetime. There are no good lawyerlike guidelines as to how to attack it, so the best thing I can do is to try to associate my client with some Washington law firm, and bingo, there it goes.

If I were practicing law in Tampa, Fla., today and somebody walked in and said, hey, I am really being slaughtered by foreign imports, that is the first thing I would do. I would go right around to my friends and find out if they knew a good Washington lawyer who could handle the case for me or handle it for my client, because——

Mr. GOTTSCHALK. We had a judge in New York who said the two best bankruptcy attorneys in the world were the one who had a great deal of experience and the one who knew nothing, because the one who knew nothing at least learned what it was.

In this field there are too many mysteries, and that is inexcuseable in terms of our domestic and international obligations.

Mr. PEASE. Would the Chairman yield?

Chairman GIBBONS. Certainly.

Mr. PEASE. I think this is excellent testimony. In my view there is no substitute for somebody who is practicing in the field. If an attorney in Tampa, Fla., or Toledo, Ohio, were to write to the Commerce Department and say, I have decided to try to establish my practice in the trade field, send me what you can that would be helpful to me, what sorts of things could you get or would you be likely to get from the Commerce Department?

Mr. GOTTSCHALK. A congratulatory letter. I think he might receive the statutes and the regulations. I think that is about all he would receive.

There has been a minimal number of writers in the field. He might look through their works. But, by and large, at this stage there is very little that he would receive that would enable him to do it. I think in part that is due to what we have just been discussing.

Mr. PEASE. You have suggested that requiring hearings before changes in—I hate to say rules because they are not formal rules—but interpretations or whatever, would be helpful. Do you think it would be worthwhile for us as a Committee in the statute to require the Commerce Department to establish by formal rule the criteria by which countervailing duty decisions are made or antidumping cases are made?

Mr. GOTTSCHALK. Yes, indeed. Yes, indeed. I think that would make a significant contribution. If the standards by which they judge a case or they evaluate the facts are required to be stated in writing, and any modification not be made without some prior hearings, it would be a significant assistance to the field.

Mr. PEASE. I thank the Chairman.

Chairman GIBBONS. Mr. Gottschalk, I see you break your testimony down into really two main categories: One you have classified as being positive recommendations; and the other one is harmful recommendations. I want to assure you that we are going to put your entire testimony in the record, including the outline of contents.

And I will make every effort to study it myself and ask my staff to study it, because we have got to find better ways of handling what I think are the big upcoming problems of the future, these nontariff barriers that really are subsidies, and just unfair predatory trade practices that we have all agreed to outlaw. The trouble is there just has been no enforcement, or little enforcement of these laws, and not coherent enforcement of these laws on our side. If we do not do it nobody else is going to do it.

Mr. GOTTSCHALK. I think, in very short summary, if we assist in the bringing of the actions when they are warranted and make it known how it can be done, if we clarify how our laws are applied, and if we depoliticize the final results, we will have accomplished the maximum that we ought to be doing right now.

I do not think that the legislation as it exists is in bad shape. I do not. I think that the problem lies in how we are applying it and in how we make it available to our industries in a timely fashion.

[The prepared statement follows:]

STATEMENT OF ROBERT M. GOTTSCHALK, NEW YORK, N.Y.

Introduction

Mr. Chairman and Members of the Committee. My name is Robert Gottschalk. I am senior partner in the Law Offices of Robert M. Gottschalk, P.C., 1350 Avenue of the Americas, New York, New York 10019, 212-977-8230. Our firm's clients consist principally of foreign business concerns. I have represented foreign clients involved in trade remedy proceedings for more than 30 years and would wish to share with this Committee some of the perspectives which I have gained on the evolution of these proceedings. My comments are directed principally tothe expense, time and predictability of the current countervailing duty and antidumping proceedings—the issues which the Chairman has repeatedly identified as the principal focus of these important hearings.

The current unfair trade remedy proceedings reflect a steady shift over time away from an investigative and towards an adjudicative model, with the most dramatic changes being made under the international Antidumping and Subsidies Codes and the Trade Agreements Act of 1979 (the "Act") which enacted the codes into domestic law. The natural consequence of the greater involvement of the public and the trade bar in the resolution of trade disputes has been greater transparency and predictability to the proceedings. It has also meant, however, considerably more expense to the parties and, frequently, through the enhanced appeals process, a more attenuated timetable for relief. Any reforms or changes in the trade laws contemplated by this committee should recognize this inevitable tension—between the laudable goals of openness and full party involvement on the one hand and the equally desirable goals of limited expense and time on the other.

Unfortunately, quite a few of the proposals advanced before this subcommittee to date, respectfully, either ignored this relationship and would serve several goals, e.g., openness, to the serious detriment of others, e.g., time and expense. Other recommendations, while couched in the guise of improving the process, would simply change the basic equities of the law, to favor one party over the other, often in a manner inconsistent with our country's international obligations under the codes and the GATT.

While my testimony today does not permit me to discuss the risks inherent in all of the recommendations, I would like to address some of the more troublesome proposals.

First, however, I would like to try to identify a few areas where, based on three years of experience under the Act, I feel some improvements may be made. The few recommendations which I discuss below would generally greatly enhance the effectiveness of the law without unnecessarily altering the careful balance now struck between openness and access on the one hand and limited time and expense on the other.

I. POSITIVE RECOMMENDATIONS

A. Enhance access to unfair trade remedies

Commerce and the ITC do an extraordinarily effective job with limited resources to help petitioners initiate, to investigate, and decide the merits in trade remedy proceedings. Unfortunately, large segments of the American business community, especially those dominated by smaller business concerns, may remain unaware of the ready availability of the antidumping and countervailing duty proceedings as potential remedies against unfair trade practices on the part of their foreign competitors.

Several steps should be taken to enhance the business community's access to, and awareness of, the unfair trade laws.

First, Commerce and the Small Business Adminstration should be instructed to undertake a massive program of outreach to the nation's businesses letting them know to the types of relief available and the means of availing themselves of that relief. This message should be conveyed at industry convocations, in fliers accompanying routine correspondence from each of these agencies, and in remarks by the President and other senior Adminisration officials.

Second, to ease further the expenses of initiating an investigation, the United States Trade Representative ideally, or Commerce, should be directed to establish a unit having no function other than to solicit, to help prepare, or to self-initiate, where appropriate, unfair trade remedy petitions. This unit should be separate from those units charged with administering the trade remedy laws so as to avoid any appearance of conflict. But the unit should be adequately staffed so that it might monitor trade statistics to identify areas of potential unfair trade practices and might be readily available in each region of the country to answer inquiries and help prepare the necessary documents to initiate the process of securing relief.

Third, Commerce should be required to develop and maintain the library mandated by sec. 777(a)(1) of the Tariff Act of 1930,[1] which was intended to serve as a complete and handy resource for petitioners and respondents alike. This library should contain not only all of the antidumping and countervailing duty statutes and regulations, but copies, digests, and indices of all trade remedy proceedings, current trade and industry statistics, and whatever else might prove valuable to interested companies and their counsel. The existing facilities at Commerce, when recently examined, fell short of this standard.

Fourth, trade associations should be encouraged to consider taking a leading role in bringing unfair trade remedy petitions where appropriate. Many of the difficulties encountered both by petitioners and respondents under past remedy proceedings stemmed from the mulitplicity of individual companies in particular industries seeking substantially identical relief under similar sets of facts. One can only wonder how much more smoothly, and less expensively, the carbon steel proceedings might have progressed, for example, if the petitioners were the American Iron and Steel Institute instead of separate domestic steel producers. Consideration might even be given to having individual company petitioners set forth in their petitions any efforts they may have made to have the action be brought by an association or group of similarly situated companies.

B. Streamline the investigatory process

The Act and its legislative history are replete with indications that the unfair trade remedy proceedings are meant to be informal investigations and not full adjudications. The Act is explicit that the rules of the Administrative Procedures Act otherwise applicable to hearings (5 U.S.C. §§ 554-557) do not apply to anitdumping and countervailing duty proceedings (sec. 774(b)). Moreover, the Act defines quite broadly the interested parties in an investigation (sec. 771(9)) and permits information to be furnished in ex parte meetings (sec. 777(a)(3)). As the relevant House report stated, "antidumping . . . proceedings are investigatory rather than adjudicatory in nature" (H.R. Rep. No. 317, 96th Cong., 1st Sess. 77(1979); *see, also,* S. Rep. No. 249, 96th Cong., 1st Sess. 97(1979)).

In practice, however, the intent that these proceedings be investigatory has often been subverted through the assiduousness of counsel representing both petitioners and respondents in seeking to intervene on behalf of their clients at every conceivable state of the proceedings. The process of discovery in a typical proceeding has come increasingly to resemble the lawyer-dominated pre-trial procedures under the Federal Rules of Civil Procedure. The Commerce and ITC investigators are being cast increasingly in the role of judges mitigating disputes between the parties rather than as impartial and aggressive pursuers of facts. The alacrity with which parties avail themselves of the limited rights of appeal has also tended to bring the courts into the investigation at every permissible point in the proceedings.

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[1] All citations, unless otherwise noted, are to the Tariff Act of 1930, as amended by sec. 101 of the act.

While this may be almost a declaration against personal interest, I am convinced that the investigations will work more smoothly and the results will be little altered if the original intent of the Congress that the proceedings be investigatory were underscored through changes in the Act and in the regulations. This view seems to be shared by ITC Chairman Eckes and by Commerce Deputy Assistant Secretary Horlick based on their testimony before you.

While it is difficult to identify numerous means by which the roles of counsel could easily be reduced, this committee should, at the very least, resist any temptation to enhance the opportunities for intervention by the parties. This could mean, minimally, not seeking to expand any further the already generous access which each party has to the confidential business information of the other.

There is one area, however, in which the Act might profitably be altered to limit the adjudicatory features of the antidumping and countervailing duty proceedings. Several of the witnesses before you, including Deputy Assistant Secretary Horlick, have already spoken to this point. This is the issue of interlocutory appeals, in particular those appeals, now permitted under sec. 516A, from a determination by Commerce that a case is extraordinarily complicated (sec. 703(c) and sec. 733(c)) or that there is no reason to believe or suspect that a subsidy is being provided or that merchandise is being sold or is likely to be sold at less than fair value (sec. 703(b) and sec. 733(b)). I do not care to belabor this point since these are both appeals from determinations favorable to foreign respondents, but I do wish to note that by the time these appeals are typically decided the issues in dispute have generally been made moot by subsequent events and petitioners and respondents have incurred vast expense unnecessarily.

C. Have a negative preliminary determination by Commerce terminate an investigation

Under the Act, a preliminary negative determination by the ITC as to the existence of injury terminates an investigation (sec. 703(a) and 733(a)). This is not the case, however, with a preliminary negative determination by Commerce as to the existence of a subsidy or of dumping. The result is that an investigation is permitted to carry on through the extensive verification and final Commerce stages when the likelihood of an outcome favorable to the petitioners, based on the last several years' experience, is rather small.

This outcome should not be surprising since Commerce must make an affirmative preliminary determination wherever there is any "reasonable basis to believe or suspect" that a subsidy or dumping exists (sec. 703(b) and sec. 733(b)). Not only is this a very generous standard from the perspective of the domestic petitioner but the Commerce determination is to be "based upon the best information available to it at the time of the determination" (sec. 703(b) and sec. 733(b)). Where petitioners are unable to satisfy this generous standard so as to meet a positive preliminary Commerce determination, they are unlikely to be able to meet the more rigorous test required to merit an affirmative final determination.

Accordingly, the interests of lessened expense, expedited outcome and greater predictability of result would all be served by having the Act amended to have a negative preliminary determination of Commerce operate as a negative preliminary determination of the ITC to terminate an investigation.

D. New methodologies to be adopted only after notice and comment

During the course of the investigations last year of allegations of unfair trade in steel products, Commerce employed wholly new methodologies for identifying and calculating subsidies. The initial notice of the use of these methodologies, which for the first time treated government equity positions as subsidies and considered a company's creditworthiness in calculating the benefit to it of a subsidy, was contained in the preliminary determinations of subsidy announced in the Federal Register. Not only did this method of promulgation arguably violate the Administrative Procedures Act which requires that agency rules not be adopted prior to notice and opportunity for comment (5 U.S.C. 553), but it also ran afoul of the clear Congressional intent expressed in the relevant House report that any newly identified subsidies would not be countervailable until "internationally recognized" and until en merated "by regulation" (H. Rep. No. 317, 96th Cong., 1st Sess. 74 (1979)). This procedure also disregarded the terms of the Subsidies Code which contemplates that signatories would consult with one another before altering the criteria to be used in calculating the amount of a subsidy (Subsidies Code, Art. 4, para. 2, fn. 2).

There are a number of important reasons why this practice of adopting new methodologies (a) in the course of an investigation, (b) without notice, and (c) without an opportunity for comment is bad policy and should be altered. First, industries and governments are unable to accommodate their behavior to the subsidies law unless they are able to know in advance of accepting or bestowing a government grant that it is potentially countervailable. Second, interested parties should have a chance to consult with Commerce and other agencies about the merits and ramifications of such new methodologies, in advance of their adoption. Third, this practice runs counter to international and domestic norms of procedure and discourages the spirit of voluntariness and cooperation so essential to the efficient functioning of the unfair trade remedy laws.

II. HARMFUL RECOMMENDATIONS

In contrast to the preceding recommendations which would serve well this committee's announced aims of reducing the expense and time involved in processing unfair trade remedy cases, while preserving the basic equities among the parties as set forth in the codes and in the Act, a number of proposals have been advanced which would be patently inconsistent with these laudable goals. In considering all of these proposals, the committee should keep in mind that the costs of a trade remedy proceeding, in terms of the attendant disruption of business and the burden of assembling and presenting the relevant evidence, are typically greater for the foreign respondents than for the domestic petitioners. These proposals discussed below would, however, generally have little impact in lessening the expense or time consumed in a proceeding. Their principal effect would often be simply to expand the protection against imports given domestic producers or make the facts supporting the foreign respondents more difficult to present or to prove.

A. Confidential business information

A number of proposals have been advanced to increase the access of the parties to the business confidential information of the others. These include proposals to make this sensitive information available under a general statement of need, without presumably identifying either the specific information sought or the reasons for the request (Oral Testimony of Deputy Assistant Secretary Horlick), and far more pernicious proposals to have the confidential information be available to employees of the parties and to outside consultants and to make available material submitted during verification.

The confidential business information made available to Commerce and the ITC is the very heart and soul of the businesses under invetstigation. It consists not only of the most detailed information as to the prices and costs of the goods in question, including all of the prices and costs of components and all of the circumstances of sale, but it also includes the names and detailed information about the firm's suppliers and customers. By definition, the opposing parties seeking disclosure of such sensitive and vital information. The Congress, Commerce, the ITC, and the courts have consistently recognized that the harm which might flow from the unwarranted disclosure of information to a competitor is potentially devastating. In many instances, this harm exceeds any possible adverse effects from even the most the most unfavorable outcome of the trade remedy proceeding itself.

On the other hand, parties do have some legitimate interest in reviewing information which might serve to rebut the principal arguments thay have advanced in the proceedings. Access to such information has some value in permitting parties to understand and monitor the activities of Commerce and the ITC so as to insure that no serious flaws or oversights develop in the proceedings.

Accordingly, a major change which the Act made in prior procedures was to expand dramatically the access of parties to business confidential information. Parties seeking to have information deemed confidential may be required to submit a detailed non-confidential summary or a statement of reasons why the information is not susceptible to summary (sec. 777(b)(1)). Where Commerce or the ITC feels that a party has improperly designated information as confidential, it shall require a persuasive explanation of the reasons for the designation (sec. 777(b)(2)). Most importantly, provision was made for the supplying of confidential information to another party pursuant to protective order where that party so requests it by an application "which describes with particularity the information requested and sets forth the reasons for the request" (sec. 777(c)(1)(A)). As this committee noted in the report accompanying what became the text of the Act, these reforms were designed "to provide the maximum availability of information to interested parties consistent with the need to provide adequate protection for information accorded confidential treatment" (H. Rep. No. 317, 96th Cong., 1st Sess. 77 (1977); **accord**, S. Rept. No. 249, 96th Cong., 1st Sess. 100 (1979)).

The regulations adopted by Commerce and the ITC with respect to the release of confidential information have further refined these rules in a manner reflecting Congresional intent. Thus, in the case of Commerce, the Secretary must weigh the relative needs of the person seeking the information and the needs of the person submitting it for confidential treatment. Moreover, disclosure will generally be made only to attorneys so as to give substance to the threat contained in the Act that a violation of the protective order can lead serious sanctions, including the disbarment from practice before Commerce or the ITC (19 CFR § 353.30(a)(3); sec. 777(c)(1)(B)). The extent to which these regulations properly recognize what has beed described as "among the delicate and important provisions in the statute" has been acknowledged in a recent decision of the Court of International Trade. *Sacilor v. United States*, 542 F. Supp. 1020, 1024 (USCIT 1982). The ITC has adopted similar regulations carefully balancing the interests of the parties (19 CFR § 207.7).

This careful scheme could be fatally undermined by the proposals before this committee to expand yet further the access to confidential information. The result could be either a serious compromising of the competitive positions of the parties or a curtailment in the readiness of all of the parties to provide voluntarily the kinds of information so vital to the effective functioning of the Act. Confidential business information disclosed directly to employees of the parties, even if they are attorneys, could too easily, through inadvertence or otherwise enter the flow of information generally available to the competitors and subject the employees themselves to an unmerciful pull between improving the competitive positions of their employers or violating the terms of the protective orders. Similarly, making such information available to business consultants would create a great risk of leakage and leave Commerce and the ITC with few effective methods for monitoring or penalizing any such unauthorized disclosure.

The proposal to have information surrendered during verification be disclosable under protective order is equally flawed in that such information is typically only elaborative of information already submitted in reply to the questionnaires. The notion that foreign respondents often withhold basic exculpating information until the verification process is simply wrong and overlooks the clear incentive on the parts of the respondents to have such information considered earlier.

In summary, the rules as to access to confidential business information are already quite generous towards all of the parties while reflecting the nature of the proceedings as investigative rather than adjudicative. Any broader disclosure standards would put at risk not only the competitive health of each of the parties but could undermine the helpful attitude of cooperativeness and openness between the parties and the investigating agencies.

B. Calculation of dumping margins

A number of the proposals before the committee would have the Act altered so as to change the rules by which the margins of sales below fair value are calculated. These suggested changes would have little or no favorable impact upon the time, expense, or predictability of the antidumping proceedings but would principally shift the equities in the law between the parties and risk the creation of artificially inflated margins of dumping. I discuss below three of the most pernicious among these recommendations.

1. Exporter's sales price offset

The exporter's sales price offset is a method for avoiding the finding of a dumping margin simply because the foreign market price includes the expenses of selling a product in the home market while the corresponding U.S. price does not include the expenses of selling the identical item in the United States. The exporter's sales price offset is used so that the final dumping margin calculations reflect a comparison between the net amount returned to the seller from his sales in his home market and the net amount which the seller receives from his sales in the United States. The Act requires that selling expenses in the United States be deducted when arriving at the United States price for sales in our country made by or for the account of the foreign producer (sec. 772(e)(2)). The exporter's sales price offset simply offsets this deduction by having the corresponding sales price in the home market reduced by the home market selling expenses up to the amount of the selling expenses incurred in the United States (19 CFR § 353.15(c)). The exporter's sales price offset has been a long-standing feature of the antidumping calculations, although it was first codified in the 1976 Treasury Department regulations. In a rather elaborate recent review of the provision, the Court of International Trade not only found the offset to be mandated by the Act but wholly consistent with logic and Congressional intent. *Brother Industries, Ltd.* v. *United States,* 540 F. Supp. 1341, 1355–59 (USCIT 1982).

The rather detailed example of the alleged inequitable operation of the offset contained in testimony before this committee is seriously flawed (Testimony of Terence P. Stewart, pp. 46–48). It assumes that the price from the factory for a transfer to a related U.S. purchaser would be identical to the price from the factory to an unrelated U.S purchaser ($112.50 in the example given) and that the U.S. importer's addition for profit would be the same in the two transaction ($22.50 in the example given). These assumptions do not reflect commercial realities since, in orther than an arm's length transaction, the related parties will take advantage of their common ownership and profit structure to lower their mark-ups. Accordingly, the sum of the two figures in a transaction employing the exporter's sales price valuation (related parties) will quite often be less than their sum in a purchase price transaction (unrelated parties). The result could well show a greater dumping margin in the case of sales involving related parties than sales involving unrelated parties—the reverse of the outcome postulated in the unrealistic example offered in the testimony.

2. Profit earned by related seller in the United States

A proposal has also been made to alter the current dumping margin calculation by requiring that, when arriving at the U.S. price in an exporter's sales price transaction (U.S. sale is by a related party), the profit of the U.S. importer be deducted from the sales price. Such a change has no support in the statute and would alter a long-standing practice in calculating dumping margins. It would also create artificial and dramatic dumping margins. In fact, it would probably result in having a large percentage of our country's imports be subject to a finding of dumping.

This change is related to the exporter's sales price offset discussed above. In both cases, the proposal calls for treating the home market prices and the U.S. prices, of the same goods differently so as to create dumping where none exists. In the case of the exporter's sales price offset proposal above, selling expenses would have been deducted from the U.S. price, but not from the home market price. In this case, the proposal calls for deducting profits on the sale of the goods in the U.S., but including profits when the same goods are sold in the home market. Such discriminatory treatment would be patently illogical and contrary to the letter and spirit of the code and the Act.

3. Causal link between differences in costs and differences in price

It has been proposed that no adjustments be made for admitted differences in the costs associated with sales in the home market and in the U.S. unless these differences are linked to a precisely quantifiable difference in the prices of the goods in the two markets. As with the two preceding examples, this change would alter a long-standing practice in the administration of the antidumping laws, would create artifical dumping margins, and would defy logic and clear Congressional intent.

The Court of International Trade recently had occasion to consider this very proposal. The Court specifically rejected the proposal as being unsound and unworkable. Permit me to quote at some length from the Court's persuasive analysis:

"It is self-evident that without adjustments for differences in circumstances of sale, price comparisons would be essentially distorted and the objective of fairness would be defeated. And it is evident to this Court that the cost approach used to quantify adjustments for differences in circumstances of sale authorized by 19 CFR § 353.15(d) is consistent with the purpose of the circumstances of sale adjustment, as enunciated in the House Report, *supra.* Indeed, for all practical purposes, the cost approach in most instances is the only efficient means of administering the circumstances of sale adjustment, considering the foreign market value and United States price must under the antidumping law be determined within very strict limits of time viz, 90 days in the instant proceeding. *See* 19 U.S.C. § 1673e(c)(1).

"In direct contrast to the primary cost approach provided in 19 CFR § 353.15(d), the alternative market value methodology prescribed by the regulation is much more difficult, and in many instances impossible, to administer fairly and efficiently. To require Commerce to analyze the effects on market value of every difference in circumstances of sale would be to require a highly complex quantification process involving a multitude of economic factors, *including a cost analysis,* and to do so within strict time limits. I have no doubt that if the market value approach were the sole (or even the primary) method utilized for quantifying adjustments for differnces in circumstances of sale, as a practical matter the resulting adjustments in many instances would be purely speculative or sheer guesswork." [Italics in original.] *Brother Industries, Ltd. v. United States*, 540 F. Supp. 1341, 1354 (USCIT 1982).

4. Home market price averaging

It has been proposed that sec. 773(f)(1), permitting the use of averaging or sampling, be repealed. Commerce is permitted to use such averaging or sampling only when, in the terms of that section, "a significant volume of sales is involved or a significant number of adjustments to price is required." Not only would such a change increase the expense and time of an antidumping proceeding, but the example used in the Testimony of Terence P. Stewart (at page 63) distorts the effect of the use of averaging in arriving at an appropriate home market price. Commerce typically averages over a period of six months, not a year as assumed in the example. Moreover, the antidumping statute is intended to address a pattern of selling at less than fair value and not an isolated instance which may well be due to extraordinary and unpredictable cost factors or to a swing in the exchange rate not large enough to require consideration of the actual exchange rate on the date of the sale. Commerce should, in the interest of time and expense, probably be encouraged to use more averaging and sampling and not less.

C. Identification and quantification of countervailable subsidies

In this area, as in the two preceding areas, the proposals have little or nothing to do with the efficiency, speed or predictability of the unfair trade proceedings. Rather they would alter in fundamental and unjustifiable ways the nature of the actions and create wholly new remedies beyond the scope of the codes or the Act.

1. Generally available Government benefits

It has been proposed that the Act be changed to have generally available government benefits be considered subsidies subject to the imposition of countervailing duties. In a recent final determination under the countervailing duty law, Commerce set forth forthrightly and persuasively the reasons why generally available government benefits are quite properly not considered countervailable subsidies:

"Section 771(5) of the Act, in describing governmental benefits which should be viewed as domestic subsidies under the law, clearly limits such subsidies to those provided 'to a specific enterprise or industry, or group of enterprises or industries' . . . All governments operate programs of benefit to all industries, such as internal transportation facilities or generally applicable tax rules. . . . Never in the history of the administration of this law or section 303 of the Act has a generally available program providing benefits to all production of a product, regardless whether it is exported, been considered to give rise to a subsidy or a bounty or grant." *Certain Steel Products from Belgium*, 47 Fed. Reg. 39328 (September 7, 1982).

The governments of every country, including ours, maintain a vast array of programs which benefit their citizens and enterprises in a variety of ways. If every domestic (i.e., non-export related) benefit so conferred were to result in the imposition of additional duties, the resulting spiral of import barriers would threaten to strangle all trade. The kinds of generally available government benefits which Commerce has found to be a legitimate function of all governments and hence non-countervailable have included environmental incentives, employment premiums for new workers and trainees, other assistance to promote the hiring of the unemployed, early retirement programs, worker health and safety programs, and energy efficiency programs. Our country provides many of the same benefits and could well find these benefits subject to the imposition of countervailing duties imposed against our exports should we take similar restrictive action here. These are patently not the kinds of grants or bounties which the code and the Act were intended to address and should not now be made the subject of countervailing duty proceedings.

2. Downstream subsidies

A number of domestic industries have complained about the unfair competition which they purportedly face from goods containing components which may have been themselves manfactured with the benefit of government subsidies. This may seem like a beguiling area for reform, but in fact the current Act already addresses the problem. Wherever a government subsidy is provided with respect to any merchandise, whether the subsidy is conferred directly, or indirectly through a subsidized component, the Act permits a countervailing duty to be levied up to the amount of the benefit conferred. Commerce has, however, properly determined in a number of instances that the benefit of the subsidy to the component did not flow to the ultimate foreign manufacturer because the sale of the component was conducted at arms length and was at the market price. In other words, Commerce has determined that the domestic producers had no cause for complaint since their foreign competitors did not receive any benefit from the subsidy allegedly conferred on the manufacturers of the components. Should the subsidized components ever enter the United States directly or should the foreign manufacturers receive any demonstrated benefit from the upstream subsidy, the current countervailing duty proceeding is already fully available as a remedy.

3. Indirect taxes

This committee has received testimony that the rebate of indirect taxes upon export should be treated as a countervailable foreign subsidy. Not only would this be contrary to Annex A of the Subsidies Code as incorporated into the Act (sec. 771(5)(A)), but in would also reverse the consistent treatment of such tax rebates under domestic and foreign countervailing duties statutes. It is always open to the Congress to have the United States adopt a similar indirect tax and rebate scheme, although this has been resisted by our government for reasons unrelated to the countervailing duty law.

As to the complaint that our countervailing duty laws should recognize as a subsidy the excessive rebate of indirect taxes, this is in fact already a feature of the Act. Whether the rebate is excessive is simply a matter of evidence (*see, Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978)). There is no compelling reason to subject the excessive rebate of indirect taxes to any greater or lesser standard of proof than any other subsidy.

D. Critical circumstances

Some witnesses have urged that the suspension of liquidation of merchandise subject to an unfair trade remedy action be moved back from the time of an affirmative preliminary determination by Commerce to some earlier period or that a situation of critical circumstances, so as to warrant the retroactive suspension of liquidation, be made easier to find. At the outset, let me say that such changes would almost certainly be inconsistent with the GATT and the international codes. The conditions under which a retroactive suspension of liquidation is permitted under the codes (Subsidies Code, Art. 5, para. 9, and Antidumping Code, Art. 11, para. 1(ii) are fully incorporated in the critical circumstances provisions of the Act (sec. 703(e) and sec. 733(e)). Any expansion of those provisions would require an amendment to the codes.

Equally importantly, however, recognition must be given to the great hardship caused foreign imports whenever liquidation is suspended. The suspension of liquidation throws the importer's market into great disarray. Purchasers are naturally quite wary of contracting to buy any goods when they have little way of predicting their duty and hence their final cost. Sales, accordingly, tend to plummet and a great penalty is exacted upon the importer who has not yet been found conclusively to have engaged in any unfair trade practices.

In the event that the foreign importer is eventually found not to have dumped the merchandise or not to have benefited from a subsidy, the law provides him with no relief from the lost sales and market disruption caused by the suspension of liquidation. Accordingly, on the grounds of equity and sound policy, this committee should be extremely hesitant about expanding the period during which suspension of liquidaton might occur.

E. Material injury

A number of criticisms have been advanced of the standards and methods used by the ITC in evaluating the existence of material injury by reason of unfairly traded imports. As with the criticisms previously discussed, these charges have little to do with the efficiency, expense, or predictability of the unfair trade remedy proceedings, but rather are related principally to the fundamental equities between the parties. Moreover, these criticisms, by and large, disregard precedent and violate sound policy. I discuss several of them below.

1. Data considered for calendar years

A suggestion has been made that the ITC be required to consider whether an industry has been injured during wholly past periods of as short as three months. In other words, it is recommended that the serious and long-lasting penalties of countervailing or antidumping duties be assessed where the domestic industry can demonstrate solely that the material injury which it suffered lasted for a brief, discrete period of time, is not continuing, and is not threatening to continue or to occur in the future.

This recommendation poses both technical and substantial problems. It would require the presentation of information with a degree of precision which is simply not possible or credible for the particular economic factors under consideration (sec. 771(7)(iii)). It would also have duties imposed upon imports where there is, by definition, no current demonstrated need for such relief. Moreover, the same difficulties presented by the proposal discussed above to limit the use of averaging by Commerce, as to focusing on isolated transactions rather than patterns, are also posed by this recommendation. Accordingly, this proposal contains little merit from the perspective both of efficient administration of the Act and sound public policy.

2. Limiting the ITC's discretion

Some domestic companies have complained that the ITC enjoys excessive discretion in performing the weighing and evaluation of the various injury factors set forth in the Act (sec. 771(7)). This criticism, like many others leveled at both Commerce and the ITC, misconstrues the nature of the proceeding as an investigation rather than an adjudication. It would have the procedures subject to the kind of precision and specificity which the broad economic factors under consideration simply do not permit and would increase substantially the expense, complexity, and time of any unfair trade remedy investigation.

3. Evaluation of lost sales and price suppression

Some domestic companies feel they face an unfair burden in that the evidence of lost sales and price suppression used by the ITC in evaluating material industry must come from third parties who may have conflicting interests in furnishing such information. In fact, the foreign importers face the identical burden in that the third party purchasers of their goods in the United States must also fear that any evidence they give which is favorable to the foreign importers will lead to the alienation of the competing U.S. suppliers of such goods. Clearly some evidence of injury is necessary before the extreme penalties of increased duties should be imposed. Lost sales and price suppression are two vital components of such injury evidence and must remain an appropriate area of investigation by the ITC.

The alternative proposed by the domestic critics would emasculate the entire material injury standard. It would have material injury presumed wherever there were unfairly traded imports, the import market share had increased, and there is evidence of underselling which would be assumed wherever the prices of imports were less than an artificially constructed price permitting the domestic company to recover the full cost of production plus a profit of at least 8% (Testimony of Terence P. Stewart, p. 140). Missing from this test is any requirement that these three separate factors be linked in any way. Yet this linkage is the very object of the ITC investigation. Simply put, this standard would presume that subsidized or dumped products had caused injury to the domestic industry unless the evidence were developed otherwise. It would also, in effect, eliminate the current multifaceted and thorough investigation of all of the economic factors regarding an industry and substitute for it, as a presumption of injury, a finding that a company was not making a reasonably generous profit. Not only does such a presumption make unsound commercial sense, it runs afoul of the codes in a number of respects including the codes' requirements that injury be determined on the basis of positive facts rather than assumptions, that specific evidence of either price undercutting or depression be considered, and that the examinations of the industry impact include an evaluation of all relevant economic factors (Subsidy Code, Art. 6, secs. 1-3, Antidumping Code, Art. 3, secs. 1-3).

4. Limiting the breadth of the preliminary investigation

A proposal has been advanced to have the ITC dispense with a conference and the submission of written comments during any preliminary investigation in which a single Commissioner assigned to that case feels the petition and questionnaire responses disclose a reasonable indication of material injury. As with so many other proposals, this one would work a major substantive change under the guise of an improvement in the efficiency of the process. GATT and the codes require an early determination of injury (Subsidy Code, Art. 2, para. 4, and Antidumping Code, Art. 5, para. 2) so that the great expense and market disruption of a full investigation may be avoided where no meaningful evidence of injury has been adduced. This thorough preliminary determination requirement is already compromised to some extent through the questionable practice of having the principal review be conducted by staff, rather than the Commissioners themselves. Despite the greatest professionalism and competence in the ITC staff, for whom I personally have great respect, the ability of a member of the senior staff to face the political scrutiny which attends a finding of no injury is necessarily less than that of the Commissioners who are themselves Presidential appointees. The object of a thorough, complete preliminary review should not be further qualified through limiting the occasions when the ITC may peer behind the often self-serving statements in the initial written submissions of the parties so as to get a more accurate picture of all of the economic circumstances of the industry.

5. Cumulation

A suggestion has been made that the Act specifically provide that the imports which are the subject of one unfair trade episode be cumulated with imports which are the subject of other unrelated unfair trade episodes so that the Act's injury standards might more easily be met. In other words, imports which may be unfair by reason of their being dumped from, or subsidized in, one country should be added to imports which may be unfair by reason of their being dumped from, or subsidized in, another country, despite the fact that the unfair practices complained of may be separated by months or years and have originated completely independently of one another and in different corners of the globe.

Not only does this propsal appear unjust on its face, it would also raise questions under the GATT and the codes. Both the Antidumping and the Subsidies Codes (Art. 3(d), and Art 6, para. 4 respectively) provide that any injuries caused by factors other than the alleged dumping or subsidy must not be attributed to the dumped or subsidized imports. This would mean that the injury from each unfair trade episode must be evaluated separately and linked to that episode so that a minimal or absent harm from one does not trigger a duty based on the substantial harm from another.

Summary

Many other recommendations to change the unfair trade remedies have been advanced in these hearings and ones held in the last Congress. Most of them resemble those discussed in the preceding sections in that they would not improve the efficiency, speed, or predictability of the proceedings as much as they would alter the fundamental nature of the actions and the equities between the parties. In light of the large number of these proposals, it has simply been impractical to comment on all of them, even on all of those which are seriously flawed or unsound. One would hope that before any specific proposals are considered for adoption, they might be identified with precision by the committee and made the subject of further testimony or comment by outside parties.

The unfair trade remedy laws constitute important checks upon international trading abuses. They must constantly be reviewed in light of shifting patterns of world trade and the competing pressure for greater protectionism, on the one hand, and freer access to imports, on the other, so as to insure that the laws serve their purpose as effectively and efficiently as possible. I hope this testimony has made some contribution to this important process of review and that the committee might succeed in its laudable goals of making the proceedings less attenuated and costly at the same time as they become more accessible and predictable.

[Supplement to the prepared statement follows:]

LAW OFFICES OF ROBERT M. GOTTSCHALK P.C.,
New York, N.Y., May 17, 1983.

Hon. SAM GIBBONS,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. GIBBONS: I wanted to thank you and your Committee for the kind reception which you accorded to me during my testimony on May 4, 1983.

After further reflection and in view of the clear interest which your Committee expressed to improve the current trade legislation, I have further recommendation to suggest for your consideration.

Under the current statutes, the petitioner, whether government self-initiated or otherwise, selects who the respondents will be. This selection can be politically motivated or commercially dictated by the self interest of the petitioner.

In the recent wave of carbon steel proceedings which terminated with the European Community Agreement, the Department of Commerce and subsequently a part of the U.S. industry omitted from the complaint a number of countries whose imports clearly should have been the subject of similar proceedings. As a result of this selective process, the condition of the U.S. market for carbon steel products has continued to deteriorate under the pressure of imports of products from countries which were not subject to attack and not subject to the later quantitative restrictions.

A representative of a U.S. steel company, petitioner, in a private conversation with me stated very clearly that he had picked countries for internal reasons which were not those creating the most damage to the U.S. market.

The respondent countries, aware of the damage that would continue to be done to U.S. prices from countries included in the proceedings, were helpless to improve the market conditions that inevitably would result from the continued unfair trade practices of the non-party countries.

The continued fall in domestic prices in carbon steel products is notorious throughout the U.S. steel market. This fall in prices, harmful to the U.S. industry and the European Community, continued unabated after the European Community Steel Agreement.

If our trade legislation is not to be used improperly and with unfortunate selectivity, a new approach should be taken which in concept and application is straight forward and simple.

In respect to the antidumping and countervailing legislation, a modification should be made as to the parties who may petition as follows:

(A) A foreign industry or company within that industry subject to a countervailing and antidumping investigation would be deemed a proper petitioner in similar proceedings against another country not then a respondent.

(B) The petitions filed under "A" above, would be tested as to sufficiency and as to their foundation—in fact, by the normal procedures.

It is clear that the basic purposes of the trade laws would be served through this modification and that one of the committees' concerns, as expressed in the hearing, namely the politicizing of the application of trade laws, would be substantially reduced to the benefit of the United States as a whole and would create more adequate protection for American labor.

I appreciate the consideration that may be given to these thoughts. Please accept my best regards.

Sincerely yours,

ROBERT M. GOTTSCHALK.

Chairman GIBBONS. Do you find any problem as a lawyer with the agency assisting a proponent in a case and also sitting as the judge in the case?

Mr. GOTTSCHALK. No; I find more difficult to accept the agency's acting as the initiator of the action itself and then trying the action. I am very much in favor of the agency's assisting completely in the filing of the complaint, because it is not making a determination in doing that. It is just making the law accessible to the complainant.

Would I prefer ideally it was someone else? Probably, but it is not a strong feeling. I would have no objection to the Commerce Department's widely aiding a complainant to form his complaint properly so that it becomes acceptable.

Chairman GIBBONS. Let me ask you. We proceed down two different roads after the complaint is filed: one through the Commerce Department and one through the ITC. Is there any reason for doing this? Could we save money or time if we combined that operation?

Mr. GOTTSCHALK. For many years we did not go through the initial ITC preliminary injury stage at all and the Commerce Department enjoyed broad discretion to decide whether it was going ahead or not. I think that there was an interpretation on our part that our GATT obligations require an injury finding very early in the proceedings. In fact, the American Government is rather upset with the Canadians at the moment because such a finding is not inherent in the Canadian proceedings. I am not sure that we can dispense with it any more, because I think it is interpreted as being required within the GATT obligations.

Are we thrilled with it? The answer is, not particularly, because it means a dual proceeding, creating additional, very expensive burdens for the complainant and burdens for the respondent, to have to be at two agencies deciding two issues at the same time during a single proceeding.

I do not know the solution. It is clear that within the GATT obligations you could do away with the ITC preliminary injury finding and create within Commerce an obligation to find injury or to make some related finding consistent with accepting the case or dropping it, which would still comport with the GATT obligation.

I do not think it has to be within the ITC. That would be the only shortcut you might make after confirming its consistency with the GATT.

What does the ITC proceeding in effect do? The amount of time the ITC has in which to reach a preliminary finding is, in my opinion, one of the grand jokes of our time. It cannot gather within that short span of time sufficiently significant facts to make a preliminary injury determination. It can, in rare instances, get to finding no likelihood of injury and no present injury, where the facts are so terribly obvious that it really cannot do anything else.

It may have adverse effects, and I can give you an example. During one of the major steel cases, the ITC's finding of present injury was based on five or eight phone calls to people in the industry asking them a question each. On the basis of someone's saying, well, yes, I think I lost some of my sales to those foreign manufacturers, the ITC found likelihood of injury or present injury.

The insufficiency of their information was legendary. But on the other hand, in defense of the ITC, the time within which they had to make their finding was also legendary. So between the two they did a remarkably good job.

It is a truncated proceeding, likely to result in shortcut findings in order to keep the proceedings going. And, as you know, under the present proceedings what Commerce finds preliminarily has no importance at all as to the final outcome. If Commerce finds preliminarily that there are no margins or that there are no subsidies Commerce does not terminate the case. They have to keep it going right through to the final.

So perhaps an improvement could also be made to allow the case to terminate in the event that at a preliminary level the Commerce Department is satisfied that it is not going to make an affirmative determination either in a countervailing or an antidumping proceeding. At the present time we are all engulfed and enmeshed in a proceeding to the end, even if the result is going to be a negative determination.

Chairman GIBBONS. You would then allow an appeal to the Trade Court?

Mr. GOTTSCHALK. For so many years we never thought of appeals. The administrative proceedings seemed to contain themselves, and afterwards everybody went home. We all now look to the Court of International Trade for appeal purposes. Every time the proceedings were shortened we in tandem handed the parties an appeal to the Court of International Trade and created that much more havoc and that much more uncertainty in the trade field.

So one of the suggestions we discuss in our written testimony memorandum is that the appeal rights should not be afforded as freely given as they are at the present time.

Chairman **Gibbons**. Cut out the interlocutory appeal?

Mr. **Gottschalk**. Yes, indeed. Yes, indeed.

Chairman **Gibbons**. But where a case is dismissed you have a right?

Mr. **Gottschalk**. Where a case is dismissed as a final decision, then you have a right of appeal.

Chairman **Gibbons**. Well, I'm going to ask our staff to look at some of the suggestions that you have made here, not only in your written statement but in your other statement. If you have any later thinking on this, we would appreciate any communication from you.

Mr. **Gottschalk**. And, of course, any one of us within my firm is available to your staff at any time that we can be of help.

Chairman **Gibbons**. Thank you.

Mr. **Pease**. Mr. Chairman, may I ask a question?

Chairman **Gibbons**. Certainly.

Mr. **Pease**. Mr. Gottschalk, you were here earlier in the morning. You heard Mr. Cunningham's testimony?

Mr. **Gottschalk**. Yes, I did.

Mr. **Pease**. Well, I raised a question with him of what happens if an American firm which feels it has been injured sort of stumbles into the Commerce Department and raises a rudimentary complaint. Is that firm well served by the Commerce Department, or must that firm in order to get any chance of real satisfaction, go out and retain a law firm?

Mr. Cunningham seemed to suggest that while it was theoretically possible for the Commerce Department to pursue rudimentary complaint and justice might be served, that it was really unlikely to happen. Yet I gather from the tenor of your comments that you are somewhat more enthusiastic about the Commerce Department and its abilities.

Could I ask you that question directly? How good is the Commerce Department about helping an American firm which essentially does not have experienced counsel?

Mr. **Gottschalk**. I have no direct experience and I was not addressing myself in complimentary terms to that facet of the Commerce Department's operations. I would make the assumption from what we know that they are not adequate to that task.

I think that you might wish to urge that a separate section of the Commerce Department be a consumer section. They do not now have an adequate library; they do not have adequate information available. I think some effort in that direction seems to be indicated from what we know.

Mr. **Pease**. Thank you.

Mr. **Gottschalk**. I wish to make a last very brief comment addressed to Mr. Cunningham's recommendation regarding upstream subsidies, one of the great nightmares of the trade field. I would like to caution the committee to look at American products going elsewhere with components coming from other countries so that we are not charged with granting an upstream subsidy on a Chrysler car containing a Japanese engine.

We suggested to the Commerce Department during the steel investigation that this is probably the most dangerous area for expansion without great prior thought. In international trade, the transistors will come from Taiwan, the box will come from Brazil, and the entire product will be stamped "Made in the U.S." because the rest is made here. But somebody up the line may have had subsidies in making the box or making the transistor. France may well attack our product coming into France as being a subsidized product because a major component in it had received a subsidy in a third country.

I want only to leave you with great caution in dealing with upstream subsidies. It is a nightmare.

Chairman **Gibbons**. We realize it is a nightmare. This whole thing is a nightmare.

Thank you, sir.

Mr. **Gottschalk**. Thank you very much, Mr. Chairman.

Chairman **Gibbons**. Let me go next to Mr. Marer.

STATEMENT OF PAUL MARER, PROFESSOR OF INTERNATIONAL BUSINESS, INDIANA UNIVERSITY

Professor **Marer**. Thank you very much, Mr. Chairman. I am going to be very brief, even briefer than my short written statement.

My name is Paul Marer, and I am professor of International Business at Indiana University. I do not represent any special interest, but appear before this committee as someone who for 15 years has followed and published on nonmarket economy countries and U.S. trade relations with them.

For the past 10 years I have been working with the staff of the Joint Economic Committee to put together a collection of expert studies periodically on East European countries.

Our antidumping laws are very difficult to apply to nonmarket economies because their price and exchange rates are arbitrary. The present U.S. law, therefore, establishes the fair value of imports from these countries on the basis of what a like item is actually selling for or could hypothetically be produced in a comparable market economy country—the surrogate country approach.

Within this framework, the Commerce Department relies on a hierarchy of approaches to determine the fair value of a like product in a surrogate country. The first option is the actual price in a comparable market economy country. Their second option is the so-called constructed value approach in a comparable market economy country; that is, taking the physical factors of production actually used in a nonmarket economy and using a comparable market economy's price or cost to try to reconstruct the unit cost in dollars.

In my view, in trade between market and nonmarket economies this constructed value approach is the fairest compromise to protect simultaneously the interests of the import competing producers, the importers, and the nonmarket economy exporters.

One practical difficulty in implementing this approach is the selection of a comparable market economy country. That is, one whose per capita income is approximately at the same level.

A group of experts whose work I had coordinated recently finished a major study for the World Bank on the problem of calculating the dollar per capita GNP of nonmarket economy countries. This group of 12 leading experts from various Western countries have been able to come up with per capita dollar figures within reasonable range, that are plausible according to any scientific criteria that one can select.

Therefore, there is a basis for the recommendation, one of my recommendations, that in implementing the current law it would be helpful if the U.S. Department of Commerce would publish a hierarchical list of market economy countries that it would designate as comparable to specific nonmarket economy countries for purposes of dumping investigation. This would create a certainty regarding this matter and would be in the spirit of several previous speakers proposing to simplify the trade laws and their implementation because it would dispense with lengthy arguments and litigation on this particular issue. This is a procedural matter which would be very simple to implement.

To sum up my own position, the only slight change in the present trade laws involving nonmarket economy dumping that I would recommend is to make the constructed cost approach option No. 1 rather than option No. 2 as is the present case. In my written testimony I give the logic and explanation of why I think that would be the fairest way of handling the problem.

Finally, I would like to make a few comments on the artificial pricing bill introduced by Senator Heinz to this committee last month and to the Senate Finance Committee last year.

The essence of the bill, if I understand it correctly, is, first, to establish by law that in a dumping or countervailing duty investigations the fair value of an article imported from a nonmarket economy country would be the lowest price, or some average of lowest prices, at which a like merchandise is sold in the United States. The second part of the bill is to dispense with the injury test and to find dumping automatically if a nonmarket economy exporter's price is below the standard established in the first part.

Now, the practical consequence of enacting such a bill would be to preclude the possibility that a nonmarket economy country would be able to compete in the United States on the basis of price. In cases where there is only a single or a small number of U.S. producers or market economy exporters to the United States, as, for example, the Polish golf cart case or the East German montan wax case, the nonmarket economy exporter would be forced to become a satellite of the other producers in its pricing policies so that, in effect, it would not have control over its export strategy or business destiny.

I think that this artificial pricing approach—as the bill right now stands—would be particularly unfair to nonmarket economy exporters because they must rely much more strongly than market economy producers on price as a means of competition. In my written testimony I go into the two sets of reasons why in many cases nonmarket economy countries really must have a bit of a price advantage to overcome some other disadvantages that they have.

So, in effect, if you preclude them this weapon to compete on the basis of price, I think that you by and large exclude a large part of their exports, especially manufactured products; and I do not think that would be particularly fair.

Eliminating the injury test, which I understand is also part of the bill, would further increase the difficulty of selling in the United States, because it would provide a strong incentive to import competing interests to make a dumping charge more frequently than if injury would have to be proven. And I do not think it would be in the spirit of our trade laws and GATT agreements to simply say any time anybody comes in and sells below my price I am going to bring a dumping charge and automatically find them to be dumping.

So far I have focused on the fairness issue. If we look at the issue from the point of view of U.S. national interests, in this respect, too, it does not seem to me that the way the Heinz bill now stands would serve our national interest.

First, it would significantly reduce competition in the U.S. markets for certain products, thus disadvantaging the U.S. consumer. Second, it would be viewed by the international trading community as a protectionist legislation and thus would perhaps trigger or justify similar legislation in other countries. Third, it would make it significantly more difficult for nonmarket economy countries to service their large debts to U.S. Government agencies as well as to commercial banks. And in either case, the U.S. taxpayer is likely to pick up at least some portion of the tab if these countries are unable to service their debts. And finally, it would not promote our exports of agricultural and other products to these countries.

Thank you very much for the opportunity.

[The prepared statement follows:]

STATEMENT OF PAUL MARER, PROFESSOR OF INTERNATIONAL BUSINESS, SCHOOL OF BUSINESS, INDIANA UNIVERSITY

My name is Paul Marer. I am professor of international business at Indiana University. I do not represent any special interest but appear before this Committee as one who for 15 years has followed and published on economic developments involving nonmarket economy (NME) countries and on U.S. economic relations with them.

Our antidumping laws state that an exporter to the U.S. sells at "less than fair value" if it charges a price lower than what it charges on its home market or in exporting to a third country. This law is very difficult to apply to imports from NME countries because, in the absence of competitive domestic markets in those countries, their prices and exchange rates are, from our point of view, arbitrary. The present U.S. law, therefore, establishes the "fair value" of imports from NME countries on the basis of what a like item is actually selling for, or could hypothetically be produced, in a "comparable" market economy country. This is called the surrogate country approach.

The validity of this approach is generally acknowledged as a reasonable compromise to deal with the problems arising from the arbitrary price and exchange rate systems of the NME countries. There is disagreement, however, about establishing fair procedures to apply it.

The regulations in effect since 1978 in antidumping investigations involving imports from NMEs established a hierarchy of approaches to determine the fair value of a like product in a surrogate country:

(1) Actual price in a comparable market economy at which the item is sold on its home market or is exported;

(2) The constructed value in a comparable market economy;

(3) The price or constructed value in any market economy other than the U.S.:

(4) The price or constructed value in the U.S.

The constructed value approach takes the physical factors of production actually used in a NME country to manufacture a product, validated by U.S. Department of Commerce case officers, and values them at prices actually prevailing in a "comparable" market economy to construct the unit cost of production in dollars. In my view, in trade between market and NME countries, the constructed value approach is the fairest compromise to protect simultaneously the interests of U.S. import-competing producers, NME exporters, and U.S. importers. Its administration need not be more difficult than procedures in many market-economy dumping investigations; the constructed cost procedure has been successfully applied in several recent cases.

A practical difficulty in its implementation is the selection of a comparable market economy country, i.e., one with approximately the same level of dollar per capita GNP. Having recently coordinated a major team study for the World Bank on the problem of calculating dollar per capita GNP for NME countries, I can attest that the problem is indeed a difficult one. At the same time, however, we also found that there are methods, agreed to by leading experts from several Western countries, whereby the per capita dollar GNPs of NME countries can be plausibly determined, within a reasonable range.

Therefore, it would be desirable and helpful if the U.S. Department of Commerce, which is in charge of determining whether an import is priced in the U.S. at less than fair value, would publish a heirarchical list of market-economy countries it would designate as "comparable" to specific NME countries in dumping investigations. From the point of view of the fairness and particality of the surrogate country procedure it is not necessary to have a precise match between the per capita GNP of the NME country and the per capita GNP of the market-economy country. A rough match, say in the range of 10% to 20% would be adequate, which experts certainly can achieve. The publication of a hierarchical list would create certainty regarding this matter and thus dispense with lengthy arguments and litigation on this issue.

In sum, in addition to this procedural matter, the only slight change in the present trade laws I would recommend is to make the constructed value approach, currently the second option, the preferred one. What at present is the first alternative is less preferable than the constructed cost approach, first, because it relies on prices supplied by a competing market-economy producer who has a vested interest in the outcome of the investigation and, second, because the NME exporter has no way of knowing in advance the standard of fair value against which his prices will after the fact be judged. Under the constructed cost approach, however, he can determine the standard of fair value before the fact and plan his marketing accordingly.

An alternative to the current laws is the "artificial pricing" approach proposed in bill S. 958, introduced by Senator Heinz at the Senate Finance Committee last year and to this Committee last month. I respectfully submit that, if enacted, S. 958 would change the present trade laws in ways that are undesirable, from the point of view of U.S. national interest and fairness to NME exporters.

The essence of the proposed change, if I understand it correctly, is (1) to establish by law that in a dumping or countervailing duty investigation the fair value of an article imported into the U.S. from a NME country would be the lowest price, or some average of the lowest prices, at which a like merchandise is sold in the U.S. by a domestic or foreign market economy producer; and (2) to dispense with the injury test and find dumping if a NME exporter's price is below that standard.[1]

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[1] A reading of the bill and of Senator Heinz's statements in introducing it suggest that the so-called artificial pricing standard would apply practically automatically to imports from NME countries. In his January 29, 1982 statement to the Senate Finance Committee, Senator Heinz stated:

"S. 958 seeks to . . . replace both sections 406 of the Trade Act of 1974 and the non-market sections of the Antidumping Act with a new system based on the principles of treating non-market economies as much like Western economies as possible. . . . During the course of the investigation, the Commerce Department would consult with the non-market economy's government and solicit from it information that would enable the Department to determine dumping or the presence of a subsidy, subject to the standards of current law for free-market economies. . . .

"In those cases where the non-market economy will not or cannot provide the necessary information, [the artificial pricing procedure would apply].

"We have tried to create with this legislation a carrot and stick mechanism that will encourage non-market economies to cooperate with our government in investigating the allegations in petitions filed against them and to adjust their economies in a way that will permit such cooperation to take place."

Because the domestic prices and foreign exchange rates of NME countries contain significant artificial elements, since they are not as a rule determined by competitive market forces, such economies would not, in my view, meet what Senator Heinz calls "the standards of current law for free-market economies." Thus, NMEs would be automatically subject to the application of artificial pricing approach to determine the fair U.S. value of their exports.

The practical consequence of enacting S. 958 would be that a NME producer would not be able to compete in the U.S. on the basis of price, regardless of any comparative advantage it may have in manufacturing a product, because it would then automatically be judged selling at "less than fair value." In cases where there is only a single or a small number of U.S. producers or market-economy exporters to the U.S. (as in the recent Polish golf car and East German montan wax cases), the NME exporter would be forced to become a satellite of the other producer(s) in its pricing policies so that, in effect, it would not have control over its export strategy and business destiny.

Putting S. 958 on the books would be especially unfair to NME exporters because to compete effectively on Western markets they—much more than producers in other countries—must lean more on price that on other instruments of competition. There are two sets of reasons for this. One is their lack of experience in effectively employing such instruments of competition as advertising, service, warranty, product identification with an established brand name, and so on. The other is that their products are often subject to various forms of explicit and implicit discrimination, tariff as well as non-tariff, which forces them to accept a price lower than their competitors'. If an importer incurs any special cost or customer resistance in marketing a NME's product, he will import it only if he is compensated by a lower price. Thus, preventing a NME exporter to compete in the U.S. on the basis of price would often be tantamount to excluding him from (or not making it worth his while to try his luck on) the U.S. market.

Eliminating the injury test on imports from NME countries would further increase their difficulty of selling in the U.S. because it would provide a strong incentive to import-competing interests to make dumping charges more frequently than if injury would have to be proven.

Although so far I have stressed what would appear to be S. 958's basic unfairness toward NMEs, fundamentally I am opposed to S. 958 because enacting such a law would not be in the U.S. national interest.

First, it would significantly reduce competition in the U.S. in markets for certain products and thus disadvantage the U.S. consumer.

Second, if the bill became law, it would be viewed by the international trading community as significant protectionist legislation and would thus justify protectionist legislation in other countries also.

Third, it would make it significantly more difficult for NME countries to earn the foreign exchange with which to service their large debts to U.S. government agencies and to private lenders. If a foreign country is unable to service its debts, sooner or later the U.S. taxpayer has to pick up part of the tab, directly in the case of loans by U.S. government agencies, and indirectly, through the tax write-offs of private lenders.

Fourth, it would hurt U.S. exports to NME countries.

Mr. Chairman, thank you very much for the opportunity to present my views.

Chairman **Gibbons**. Thank you, Professor.

We obviously need to learn a lot more about how to deal with the nonmarket economies and to deal with them in a fair and open manner. It has been a problem that the Congress has wrestled with, and perhaps your dissertation on it will help us understand it a lot better. We appreciate your coming to help us on this matter. Thank you.

Professor **Marer**. Thank you.

Chairman **Gibbons**. Our last witness for today is Mr. Heebner from the American Restaurant China Council.

Go ahead, sir.

STATEMENT OF JOHN C. HEEBNER, VICE PRESIDENT, AMERICAN RESTAURANT CHINA COUNCIL, INC., ACCOMPANIED BY JAMES MAGAVERN, COUNSEL

Mr. **Heebner**. Mr. Chairman, my name is John Heebner. I am the president of Buffalo China in Buffalo, New York, and I am appearing here today on behalf of the American Restaurant China Council, a trade association representing the majority of American manufacturers of hotel and restaurant china. With me is James Magavern, our legal counsel.

We have asked to speak here today because foreign imports, particularly from the People's Republic of China, have increased at an explosive rate in the last 3 years and now threaten the very existence of this small industry.

I am submitting with this statement a study entitled, "The Need For More Adequate Safeguards Governing Imports from Non-Market Economies," which was written by Professor Lee Albert of the faculty of law at the State university of New York. And this study examines current economic thinking and explains why we cannot simply assume that the dislocation costs created by freer trade policies will necessarily be offset by the long-term gains for the economy as a whole.

And I wish to request that this study be made a part of the record, because I believe it is an important and a competent analysis.

Chairman GIBBONS. All of it will be made a part of the record.

[The study follows:]

THE NEED FOR MORE ADEQUATE SAFEGUARDS GOVERNING IMPORTS FROM NONMARKET ECONOMIES

(By Professor Lee Albert)

INTRODUCTION

That international trade is mutually beneficial to this nation, and others, has been a central premise of economic thought and American public policy. Competitive imports enable American consumers to purchase at lower prices and force American industries to become more efficient. Trade thus augments productive efficiency and consumption possibilities. Accordingly, domestic producer claims for import relief understandably encounter skepticism.

Although these axioms are venerable, American public policy increasingly reveals disquiet and uncertainty over the realization of benefits from cheap imports and the economic dislocations caused by them. The private and social costs of high unemployment, idle capacity, wasted machinery and distressed communities provoke inquiry into whether the realized benefits from trade outweigh these dislocation costs. Similarly, there are doubts over the fairness of competition between American industries and foreign ones, particularly producers in a state-controlled economy who are exempt from market forces. Are such suppliers more efficient than American companies or are their prices determined without regard to the actual costs of production? Should we allow American companies to go under and bank on the long-range availability of low-priced goods from communist nations?

Modern economic thought underscores the appropriateness of these questions. Economists confront the numerous gaps between the classic model of perfect competition and fully utilized resources and our second best world of significant unemployment, underutilized capacity and imperfect competition. Economic theory in turn is replete with elaboration of the restrictive conditions under which a nation may gain from freer trade. Hence, there are numerous qualifications on the premise of classical economics that more trade is better than less. Empirical studies reveal that the benefits of moves towards freer trade are often uncertain or modest, while the costs of such moves frequently are immediate and severe. Economists also attend to the divergence between private and social costs and acknowledge that there are significant social costs of freer trade. Prolonged or chronic unemployment, transfer payments and community disruption and decline are among the social burdens of freer trade policies.

This paper relies on modern economic analysis and the public policies expressed in American fair trade and anti-trust laws in setting forth arguments for more effective safeguards for U.S. producers. Particular attention is paid to the issues of fair competition, dislocation costs, and long-run benefits in respect to imports from non-market economies, in which prices and costs are administratively determined.* The case for relief, however, goes beyond non-market [illegible]

The American Restaurant Chinaware Industry has been engaged in a competitive struggle for survival against imported chinaware. By virtue of a large change in U.S. trade policy several years ago, the chief adversary in this contest is the People's Republic of China (P.R.C.). The trade issues posed by P.R.C. chinaware imports provided the occasion for this paper and well illustrate the need for change in U.S. trade policy. Although this paper is not a case study of an industry, certain characteristics of chinaware import competition are set forth as background for the general fair trade questions subsequently explored.

The domestic restaurant china industry consists of independent producers selling in a highly competitive market. The American industry rests on an advanced technological base; it employs sophisticated modern machinery representing significant amounts of capital investment. This stock of capital goods is industry-specific: the mechanized productive factors cannot be used to manufacture alternative goods. Notwithstanding mechanization, the industry remains labor-intensive and employs many workers whose skills and experience are not readily transferable to other jobs. Many of the restaurant china producers are located in the nation's most economically distressed areas, such as upstate New York, Pennsylvania and Ohio.

Given modernization and specialization, the productivity of American china producers is significantly higher than that of foreign competitors. Notwithstanding such superior productivity, imports of restaurant china has grown rapidly in the last five years and now equals about one-third of the total sales of restaurant china in the U.S. Since the advent of the trade agreement with the People's Republic of China several years ago, imported chinaware from the P.R.C. has increased dramatically. It now constitutes about one-third of the total chinaware imports sold in the United States. Such rapid market penetration reflects a U.S. price for P.R.C. chinaware that is significantly lower than the costs of U.S. producers and indeed of any producers subject to the constraints of a market economy. No free-market producer approximates the P.R.C. price in the United States; only suppliers in Poland, another state-controlled economy, come close to that price. Given the exceedingly low price of P.R.C. chinaware, existing tariffs on imported chinaware, although not insubstantial, have had a limited effect in retarding P.R.C. sales in the United States. The growth in P.R.C. chinaware imports, both past and threatened, poses two related questions for American public policy: are the economic and social benefits from such imports greater than the dislocation costs of such trade? Is such trade consistent with the basic ground rules and understandings of fair competition in a market economy?

These questions constitute the subject of this paper. The paper first sets forth the arguments for modification of U.S. trade policies in a summary and adversary form. It then amplifies the arguments and relates them to contemporary economic and legal thought on international trade. Footnotes and a bibliography are at the end of the report.

PART ONE—SUMMARY OF POINTS

It is commonly assumed that moves toward unrestricted international trade give rise to economic benefits substantially in excess of their obvious domestic costs. Free trade economists utilize seemingly rigorous mathematical proofs and graphs to demonstrate that the consumer gain from trade is considerably greater than the loss to American producers, employees and suppliers. The concepts of consumer and producer surplus are used to express this result in monetary amounts. Improvement of national well-being from trade is an article of faith among economists and others.

Notwithstanding the illusion of precision in such economic analysis, the economic case for freer trade is uncertain and problematic. Efforts directed at actual measurement of the effects of changes in trade policy increasingly reveal that the gains are less and the losses significantly greater than the suppositions of the orthodox theory of trade. Modern economists recognize that the set of assumptions behind economic models of trade contain many crucial departures from actual conditions in the second-best world in which we live.

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*The distinction between state-controlled and market economies is significant in trade literature in respect to dumping and subsidy problems. State-controlled economies are virtually synonymous with socialist or communist nations. A few of the latter are thought to employ sufficient market principles as to allow treatment as a market economy, e.g., Yugoslavia. Government intervention in a market economy is dealt with solely as a subsidy problem. Trade literature does not address the vexing question of the kind and degree of government intervention that casts doubts on acceptance of an economy as controlled by free market principles. Alternatively put, a considerable amount of intervention in a market economy is accepted as normal.

Although free trade economists recognize, as they must, that changes in trade policy toward freer trade have significant income redistribution effects, they measure any dollar of gain or loss equally, regardless of the size of such gains or losses and of who experiences them. While this yardstick facilitates assertions about "aggregate" national welfare, it ignores that the losses from freer trade policies falling upon American producers, employees, and suppliers are disturbingly large and concentrated, while the gains to consumers are highly diffuse and realized in the long-run. Ignoring concentrated losses is contrary to our intuitions, experience and public policies. Abrupt and substantial reductions in income and personal wealth entail both pain and demoralization. Many public programs are aimed at preventing or alleviating these special costs of planned or unplanned redistributions of income.

Whether a trade policy change represents an improvement in community welfare depends on both an estimate of the aggregate dollar gains and losses and on whether its impact on the distribution of income is favorable or at least tolerable. The economic assessment is incomplete and flawed because it ignores the latter. Because trade policy liberalizations frequently have large wealth effects, the economic model does not accurately reveal whether the nation has gained or lost from the change.

There are other omissions in the economic model of trade. Although the bedrock notion of trade theory is that a nation should produce and export those goods in which it has a comparative advantage, there is no longer an agreed-upon concept of comparative advantage that account for the actual patterns of trade among industrial nations in manufactured goods. Without such an explanation, we cannot be confident that international trade in such goods is really based on relative efficiency. Most notably, we cannot identify the comparative advantage of suppliers and producers in nations in which profits are irrelevant, state-controlled economies.

The traditional economic model addresses the benefits of trade by contracting free trade and no-trade, whereas the policy question is how much trade is beneficial. Economic studies addressing this question by examining the effects of tariff reductions reveal that the gains from large-scale reductions are indeed modest. An across-the-board removal of U.S. tariffs would produce a less than a 1 percent increase in the nation's gross national product. One should question how much political and social divisiveness the U.S. should incur over freer trade policies in light of these small economic benefits. In sum, orthodox economic theory provides a far more restrictive case for free trade than is commonly supposed. The skepticism initially engendered by claims for protection of domestic producers is misplaced.

Modern economists recognize that orthodox trade theory provides an inadequate basis for current issues of national commercial policy because it compares states of trade and no trade as if nothing of consequence happens in between these two "equilibrium" states. But the economic disruptions and disturbances in transition periods are too significant to ignore. Once we cease to assume that our economy can move into a new steady state after trade without wastage of resources, machines, and labor, the net results of trade, calculated solely in *private* costs and benefits, may be negative. Or the gains may be trivial.

There is first the effect of increased trade on the productive process, with its stock of intermediate goods, expensive machinery and technology. These goods represent significant amounts of investment capital earning a normal rate of return prior to a freer trade policy. Much of these goods are industry-specific and incapable of transfer through sale. Transitions from changes in trade policy involve junking of this capital stock; the capital values or investment they represent become a dead loss. They cannot be transformed into new consumer goods or shifted into export industries, as orthodox trade theory assumes. Commonly experienced sticky wages or labor costs will hasten the decline of an import-sensitive industry and hence accelerate the worthlessness of capital stock. Large or unpredictable changes in trade policies exacerbate these losses.

The effect of new imports on American labor during transition periods—which may be the employable years for many workers—are equally severe. Common experience demonstrates that displacement costs for workers are substantial. Where an import-competitive industry lays off workers, they do not costlessly move into an expanding export sector or some other productive employment. They do not readily find work elsewhere at the same pay, even in a relatively full-employment economy. People's next best alternatives are well below their best ones, especially after they have become committed to their current jobs through choice of residence and personal skills. Displaced workers sustain prolonged income losses while trying to find new jobs and suffer lower pay on new jobs as well. New trade policies that reduce existing tariffs or remove other trade barriers produce the most severe employment effects.

Studies of displacement costs assume normal macroeconomic conditions—relatively full employment and utilization of machinery. Where the economy is marked by high unemployment and idle capacity, displacement costs in the form of job and capital loss are significantly higher than they would be in a normal growth economy. It is no accident that social concern with trade-related effects are greatest during economic recessions. Further, the loss of faith in the standard macroeconomic measures for recessions requires more careful examination of the impact of imports on jobs and productive resources.

Recent studies show that estimated displacement costs have been great enough at times to exceed the gains from tariff reductions. This conclusion is based solely on a reckoning of private costs and benefits, a calculation that is incomplete because private and social costs frequently diverge in our domestic economy. Social costs commonly exceed private ones. Suppose, for example, that jobs in particular import-competing industries generate greater returns for society than the returns perceived by the workers in those jobs or by people deciding to take them. That will be the case where the jobs bring gains in knowledge, skills, and work attitudes that benefit persons other than the workers and employers in the industry. That too will be the case where workers are unskilled or marginal employees, who, absent work in certain industries, will encounter difficulties in finding alternative jobs. If so, they will become unemployable for a substantial period of time and such unemployment will have effects on third person, e.g., family instability, crime, transfer payments, regional decline and dislocation. In these circumstances, the social benefits of maintaining or increasing employment in an industry will exceed private benefits and the social costs of contraction will exceed the costs to workers and employers. These "externalities" justify policy measures aimed at keeping and attracting workers to the sector.

Hence, the gap between strictly private costs and social ones from industry decline can make a tariff beneficial, since tariff protection will encourage firms to expand output and hire more marginal workers. The social benefits of maintaining existing jobs or creating additional ones will outweigh whatever private losses are associated with consumers paying more for a product at home than they perhaps would pay without a tariff.

Several antitrust statutes acknowledge that foreign producers, including foreign governments, are governed by the same principles of antitrust as American producers when they enter American markets. But when we look to the realities of antitrust enforcement and adjudication respecting import competition, we confront an anomaly: the Department of Justice, commentators and even courts maintain that the fairness of competition from low-priced imports and injuries to domestic industries as well are matters beyond the purview of the antitrust laws. Curious rules equating state subsidies with productive efficiency and others are employed to avoid confronting monopolization and price discrimination claims. Hence, state power behind state enterprises is irrelevant to market power in the U.S. In practice, antitrust constraints have no application to import competition, notwithstanding repeated assertions to the contrary in the U.S. Code.

As recently reaffirmed in the Tokyo Round agreements, and subsequent U.S. legislation, U.S. fair trade laws are critical in providing protection against unfair import competition. These laws are central to acceptable freer trade policies because they embody a concept of fair competition that is a part of the ground rules of a free market economy. We accept the substantial domestic harms and dislocations of foreign trade not merely because that affords cheaper goods but because free market postulates, or values, dictate that foreign producers should have access to American markets if they are truly more efficient than domestic industry. If they can do the job better, they deserve the business of American consumers. But they are more efficient only if their U.S. price fully covers the costs of producing the goods sold in American markets. Conversely, if the costs of production are not recoverable from the U.S. price, the foreign producer is not as efficient as its price would indicate. Competition at that price is unfair. The price reflects either monopoly power in another market or a subsidy and these are not to be equated with efficiency.

Few doubt the principle. The problem lies in making it workable in regard to foreign suppliers who do not produce under competitive conditions. In non-market economies, the state establishes both home and export prices and they may not be related to production costs. We cannot use the home market price or production costs to calculate "fair value" in an state-controlled economy (SCE). To date, we have used surrogate measures of costs and prices, but these are expedient and artificial approximations, sadly lacking in economic validity.

The trade objectives of communist nations indicate that exports from such nations are state-subsidized, contrary to GATT rules and the U.S. countervailing duty mandate. Similarly, there is reason to believe that export prices are set at a level necessary to penetrate U.S. markets, without regard to pre-existing conditions of supply and demand. Such prices are calculated to injure domestic industry, and production costs are irrelevant. Hence, SCE imports carry a high likelihood of contravening our anti-dumping and countervailing duty laws.

But administration of these laws has not provided reliable determinations commensurate with this danger. Instead of esoteric analysis of costs, what is needed is reform that would provide a larger role for settlements and the use of simplified legal criteria for both dumping and countervailing duty determinations.

We finally must recognize that the economic planning policies of SCE's, particularly the PRC, have been notoriously fluid and unstable. U.S. foreign policy also tends to be short-run and transient. The counter-trade agreement, a vehicle for SCE trading, almost by definition promises a temporary supply of low-priced imports. Instability in a flow of low-priced imports to the U.S. is enormously costly to this country, since the domestic costs of trade policy changes are highest initially and during a transition period. Cheap imports, therefore, impose immediate costs as domestic employment and productive patterns change. The trade relationship between the U.S. and the P.R.C. provides no assurance of long-run availability of goods to consumers. Consequently, we may incur the short-run costs of trade—dislocation, capital losses, unemployment—without obtaining the longer term benefits.

The twists and turns of U.S. foreign policy, such as the abandonment of detente with the Soviet Union, render long-run economic benefits from trade with particular SCE's exceedingly uncertain. Finally, we have come to appreciate that the foreign policy considerations supporting freer trade with communist nations are not compelling.

PART TWO—THE ARGUMENTS

I. The uncertain case for freer trade under orthodox economic theory

The pervasive and deeply-held assumption that economic theory powerfully argues in favor of freer trade is an important back-drop for public policy assessments. Revealing the limits and qualifications in free trade theory is therefore critical to appreciating the magnitude of economic gains from freer trade, the conditions for their accrual, and the character and size of displacement costs imposed by new flows of imports.

A. Comparative advantage and the gains from trade

Trade theory begins with Adam Smith's perception that labor productivity is a function of specialization and that trade enhances specialization by enlarging markets for goods. Ricardo established the subtle and important case for trade over no-trade (autarky) with the famous theory positing that comparative rather than absolute advantage is a sufficient condition for mutually beneficial trade.[1]

To facilitate exposition, assume two nations, two commodities and one productive input. Absolute advantage exists where each country is technologically superior (i.e., greater output per unit of input) in the production of one commodity. In a comparative advantage situation, however, one country can produce more of each commodity per unit of input than the other and thus has an absolute advantage in both goods. As long as the degree of superiority in producing each goods differs, however, there are opportunities for trade.

Assume, for example, that the U.S. can produce both a quantity of steel and textiles with less productive inputs than the U.K. Specifically, in the U.S. it takes 25 inputs to produce a unit of steel and 10 inputs to produce a unit of textiles; in the U.K. the figures are 60 and 15 respectively. Hence, the U.S. has a lower input per unit than the U.K. in both goods, but its productive superiority is 60/25 (2.4) in steel and only 15/10 (1.5) in textiles. Although the U.S. is absolutely superior in both commodities, the overall situation is one of comparative advantage. The U.S. has a comparative as well as absolute advantage in steel and a comparative disadvantage, although an absolute advantage, in textiles. By definition, a comparative advantage must be accompanied by a comparative disadvantage. Because the degree of U.S. superiority in producing steel and textiles differs, trade is possible.

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[1] Adam Smith's views on trade are set forth in his classic, "The Wealth of Nations" (1776). Ricardo's are in "Principles of Political Economy and Taxation." The literature on comparative advantage is vast; much of it is collected in Richard E. Caves, chapters 3-5 (1960) and J. Bhagwati (1969).

Both countries can gain from specializing in production and exchange despite the greater productivity of the U.S. The U.S. will shift inputs from textiles to steel and the U.K. will do the opposite. Each will export the good for which it has a comparative advantage.[2] Thus the theory of comparative advantage predicts a flow of imports from foreign producers who are technologically inferior to domestic producers.[3] As we shall see, imports from productively inferior products pose serious questions under market principlies of fair competition.

With trade consumers in both the U.S. and the U.K. can acquire the import commodity at a lower price (in terms of the export commodity) than would be possible with only domestic exchange. Alternatively put, with trade each country obtains more goods for a given cost in productive resources. Economists utilize production and consumption maxima to illustrate that more goods are available with trade than without it.

Where a nation's aggregate resources are constant and fully utilized, its maximum production possibilities are fixed. Prior to trade, its maximum consumption possibilities, the consumption boundary, is the same as its production boundary. After trade, the consumption boundary is larger and exceeds the production boundary. These additional consumption possibilities constitute the gain from international trade.[4] The gain from trade in terms of extra consumption must accrue, although not equally, to both nations, or voluntary exchanges would not occur.

Subsequent economic writers have extended and refined this analysis without modifying the basic principle of comparative advantage. Adding the fact that real world trade is conducted in national currencies complicates the analysis but does not compromise the law of comparative advantage.[5] Instead of goods per unit of input, later economists speak of aggregate amounts of goods in terms of other goods that a nation employing all its resources could produce. This allows employment of production possibility curves, or transformation curves, to illustrate the different combinations of commodity amounts a nation could produce with resources fully and efficiently employed.[6]

Increasing opportunity costs have replaced Ricardo's assumption of a constant trade-off between increments of one good and another. Increasing opportunity costs signify that as one industry expands at the expense of another, increasing amounts of other goods must be foregone to get each additional unit of the good in the expanding industry. The concept reflects the rising marginal costs found in most industries. Under conditions of increasing marginal costs, countries tend to specialize incompletely and marginal costs are bid into equality in world markets.[7] Rising opportunity costs more accurately describe actual trade patterns in which countries continue to produce some of the domestic consumption of goods that they import.

Economists identify two other less significant causes for trade among nations: scale economies—decreasing marginal costs in mass production—would also make international trade profitable where an expanded market is necessary to achieve the efficiencies of mass production. And differences in national tastes or demand in two countries may account for trade even where cost-price ratios are identical.[8]

To complete the story of how much trade will occur between nations and at what price the goods will be traded requires the addition of each country's demand and supply curves. Demand is dictated by the tastes and incomes of the users of final products. The demand curve represents the quantity demanded of any good at particular prices, money here being a surrogate for any and all other goods. A national supply curve in perfectly competitive markets (price-taker markets) represents the marginal costs of producing particular quantities of a good. Demand and supply schedules show the international market clearing price at which domestic and foreign demand and supply are in balance. Under supply-demand analysis, the new free-trade equilibrium price will reveal an import demand just equal to export supply for the goods steel and textiles in the above example.[9] This framework also illustrates that a nation's total consumption possibility is greater with trade than without.[10]

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[2] See Samuelson, ch. 34 (1976); Kindleberger, ch. 2 (1978).

[3] Jackson, Interface One (1980); Hudec, Interface Two (forthcoming 1982).

[4] Id.

[5] That foreign trade is conducted in national currencies and that national currencies are traded in foreign exchange markets is what creates the esoteric subject of international finance. Because of its vastness and complexity, that subject is not covered in this paper. A textbook view of foreign exchange markets may be found in Yeager (1976).

[6] Samuelson, ch. 34 (1976); Kindleberger, ch. 2 (1978).

[7] Id.; American Economic Association, MacDougall essay (1967).

[8] Samuelson, ch. 34 (1976); Kindelberger, ch. 2 and 3 (1978).

[9] Ohlin, ch. 5-7 (1967); Kindelberger, ch. 3 (1978).

The community indifference curve, a geometric tool, is used to express the gains from trade. An individual indifference curve represents the different combinations of two commodity quantities that would bring an individual or household the same level of utility, as expressed in an individual's willingness to exchange one commodity for the other, indifference being the point at which an individual would decline further exchanges. The community curve represents the aggregate of individual curves. This construct illustrates that after trade, a community moves from a lower set of indifference curves to a higher one. There has been an increase in aggregate utility because the extra amount of a commodity imported, say textiles, is more than sufficient to compensate for the decrease in an exported good, say steel. Hence, consumer satisfaction is augmented through trade.[11]

In our steel-textile instance, the gain from trade is to consumers of textiles in the form of lower prices. "Consumer surplus" is the concept economists employ to measure this gain; it represents on a supply-demand schedule what it is worth to consumers of a product to be able to buy that product, or more of it, at a lower price than some consumers would be willing and able to pay. It thus allows us to quantify what the better price for textiles after trade would be worth to consumers.

After trade, domestic textile producers, of course, are faced with a lower price for their product and hence a loss of income for people associated with producing the good when trade began. "Producer surplus" expresses this loss; it is a measure of the net gains from being producer-sellers of a product, here textiles. A lower price after trade causes a decrease in producer surplus in two ways: American producers receive less revenue on the textiles they continue to produce and no revenue on the textiles that were profitably produced without trade but are now imported. The decrease in producer surplus is a loss to workers, input suppliers, and investors in the textile industry, but the concept of producer surplus does not permit us to identify the division.

These concepts of consumer surplus and producer surplus produce monetary figures that show that the consumer gain from trade is larger in the aggregate than the producer loss. As Professor Samuelson, a free trade advocate, puts it, losses to "not particularly worthy producers" are less than gains to "not particularly unworthy consumers."[12]

B. Difficulties in measuring the effects of trade on community welfare

This aggregate comparison of consumer gain and producer loss is the basis for the assertion that trade has a positive effect on community or national welfare.[13] In drawing that conclusion, however, economists have left the realm of economic theory to express a policy preference, for economic principles alone cannot establish that the gains exceed the losses. Measurement is critical and there is no agreed upon or persuasive economic yardstick.

In any situation of choice in which some members of a community gain and others lose, economic theory alone cannot determine that the output improves aggregate welfare, for there is no calculus for comparing levels of satisfaction or welfare from one person or group to another. If, as a result of a policy choice, one group is better off but others are in a worse position, economic theory does not tell us how the welfare of the community as a whole has been effected. That depends on values to be attached to the gains and losses.

Welfare economics relies on the hypothetical compensation principle: if it is clear that the beneficiaries of a change have enough additional income to compensate (or bribe) the losers for their loss, and some left over, the new position represents an improvement.[13] If compensation actually occurs, there are no losers and the change is an improvement. But for a variety of reasons, losers are seldom compensated. Without the compensation, the principle that an aggregate change is good as long as the gainers could compensate the losers is not convincing. For example, we do not and cannot reliably know what amount the losers would accept as adequate compensation. Without this information or an acceptable yardstick, the gains may or may not exceed the losses. Where, as here, there are significant distributional impacts of a policy choice, they must be acknowledged in the assessment of community welfare. Whether a new position represents an improvement in community welfare depends on both an estimate of the aggregate dollar gains and losses and on whether the impact of the change upon the distribution of income in the community is favorable or at least tolerable.

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[10] Id.; Samuelson, ch. 34 and 35 (1976).

[11] Kindelberger, ch. 2 and 3 (1978).

[12] Samuelson, ch. 34. For an unusual expression of a skeptical view, see Lipsey and Steiner, ch. 39 and 40 (1966).

[13] Kindelberger, ch. 3 (1078); Mussa, 1191–1204 (1974); Yeager and Tuerck (1976); F. Bator (1957).

The economic assessment of the effects of trade is flawed precisely because it ignores effects upon the distribution of income. In relying on consumer and producer surplus, economists treat all dollar gains and losses equally, without regard to who experiences them and in what amounts.[14]

Treating gains and losses without regard to where and how they fall is problematic. Common sense tells us that people do not regard their loss of a first hundred dollars with the same dissatisfaction as the loss of their last one hundred dollars. Similarly, we do not view someone's sudden and prolonged loss of a job with an annual income of thirty thousand dollars as imposing less harm or diswelfare than an annual loss to General Motors of forty thousand dollars. But, in fact, the aggregate approach to community welfare treats the General Motors' loss as worse.

As we shall see, a large and concentrated loss to an American industry, its employees, suppliers, and others, is a not an uncommon effect of certain trade policy changes. As economists observe, the aggregate dollar value of the consumer gain over time will exceed the aggregate dollar value of these concentrated losses. But that does not allow us to say that the move has improved national welfare. Diffuse gains to consumers are important, no doubt. But concentrated losses, large and abrupt changes in income, are a special concern in the making of public policy. So too are perverse income distribution effects, such as those that worsen the lot of employees whose earnings are below or near the poverty threshold.[15] Numerous public programs seek to prevent or alleviate these consequences, as, for example, disaster relief, unemployment and disability insurance, no-fault compensation, and trade adjustment assistance.

In sum, before assuming that a policy move toward freer trade improves national welfare, one must look more closely at the intensity of the losses and the groups that bear them. The seemingly precise monetary amounts in the concepts of producer and consumer surplus may obscure but do not eliminate the immediacy and concentration of the losses and the diffusion and gradualism of the gains. The net national gain or loss from a trade policy is not a function solely of the volume of trade created and the change in price caused by trade.

C. A qualification on the principle of comparative advantage

Modern economic thought on international trade has a serious hiatus, for there is no general theory that explains trade patterns among industrial nations in manufactured goods. Ricardo's labor theory of value was replaced by the Heckscher-Ohlin factor proportions explanation of trade patterns. In abbreviated form, this theory provides that different products require different proportions of labor and capital and different countries have different relative endowments of labor and capital. Countries will have a comparative advantage in producing goods that use their more abundant-factor more intensively; each country will end up exporting abundant-factor goods in exchange for imported goods that use their scarce factor more intensively. The theory assumes that the technology of production is the same in all countries—production functions are identical. Different factor endowments is why domestic prices differ before trade.[16]

The theory failed a critical test in the 1950's, when Wissily Leontiev found that the United States, seemingly a capital abundant country, was exporting labor instensive goods in exchange for a more capital intensive imports. Subsequent empirical research confirmed the "Leontiev paradox"—U.S. exports were more labor intensive than its imports. Data from other countries turned up fresh contradictions to orthodoxy as well.[17]

The paradox led to more elaborate views of the factor content of foreign trade and modification or rejection of the orthodox Heckscher-Ohlin theorem. The theory is vague and elusive because the factors of labor and capital must be defined with greater specificity; because nations trade in intermediate goods—factors; because labor-capital inputs vary with their relative costs; and because production functions plainly are not identical. New theories have proliferated. Increasing recognition has been afforded to the role of new technology and subsequent technological diffusion among nations to explain trade in manufactured goods. The product cycle theory holds that as the technology of a product becomes more standardized and static, the product migrates from innovating human-capital abundant countries to lower income countries where labor costs become a more important basis for comparative advantage than do research and development and technological advantage. Linders representative demand hypothesis finds causal connections between income, tastes, technology and trade. It predicts that a rise in per capita income in a nation shifts that nation's representative demand pattern toward luxury goods; producers come up with impressive improvements in the technology of supplying luxury goods; their efficiency gains exceed the rises in consumer demand that cause them, leading that nation to export those goods at lower prices. Another theory explains trade patterns, especially U.S. exports, in terms of human capital. Application of Leontiev's calculations with measures of human capital per worker revealed that U.S. exports were indeed more human capital intensive than imports. Relative differences in natural resource endowments also explain certain trade patterns.

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[14] Samuelson, ch. 34, p. 678 (1976).

[15] A persuasive statement is found in Calabresi and Bobbitt, 32–33; 83–87 (1978). Also see Musgrave (1959); Posner (1970); Kindleberger, ch. 5 (1978).

[16] Ohlin (1933).

[17] Leontiev, reprinted in Bhagwati (1969); Baldwin, 130–135 (1971); Kindleberger, ch. 5 (1978).

This tapestry of theories demonstrates the analytical inadequacy of lumping productive factors into capital and labor or labor and land. In place of a unified theory, however, there now are many competing theories to explain trade patterns among industrial nations in manufactured goods. Trade data provides some support for one theory or another. But international economics has no comprehensive or accepted theory to identify the critical factor of comparative advantage.[18] Without such a theory, we cannot be sure whether or why trade is based on the relative efficiencies of nations in producing goods.

To be sure, lower initial prices of foreign goods in market economies over American goods is strong evidence of lower production costs. But economic theory provides no reason to believe that the benefits of trade based upon comparative advantage obtain in trade between market countries and state-controlled economies (SCE's). Given inadequate information on prices and costs in a non-market economy, we cannot identify the comparative advantages of an SCE in the making of particular products. The explanation available for market economies—prices reflect production costs—is inapplicable to an SCE, since domestic and export prices are administratively determined. International trade theory is an extension of domestic market theory. Hence comparative advantage does not explain the basis for trade with an economy not governed by market principles.

D. The overall private economic costs of existing U.S. tariffs are a trivial percentage of gross national product

Economic trade theory calculates the benefits from trade by contrasting states of free trade and no trade. But the principal question for policymakers is whether a move toward more trade produces singificant gains. Analyses of the gains and losses of major tariff reductions reveals that the benefits would be modest.

Pursuant to orthodox theory, a tariff lowers national well-being because it costs consumers more than it benefits producers (employees, suppliers and owners) and the government, which collects the revenue. A tariff thus redistributes income from consumers of the imported products toward these groups. Conversely, a free trade policy redistributes income from these groups to consumers.

More specifically, the aggregate cost of a tariff is divisible into a consumption and production effect. The production effect is a loss represented by the fact that productive resources at home are being used to produce a good that is produced more cheaply abroad. The consumption effect is due to the higher domestic prices for the protected product.[19]

Once one recognizes that tariffs affect the cost of inputs as well as final products, measuring the aggregate effect of tariffs on producer interests becomes complex. In dealing with this proliferation of impacts, economists utilize a concept of the "effective rate of protection" to measure the percentage effect of the entire tariff structure on the value added per unit of output in each industry. This tool serves to reveal that a tariff in one industry effects a number of industries and that incomes in any one industry are affected by the tariffs of many industries.[20]

Economic theory allows for one exception to the net negative effect of tariffs, the nationally optimal tariff. When a nation as a whole can effect the price at which foreigners supply imports (monoposony power), a tariff can be nationally optimal by inducing foreign suppliers to lower their price in order to limit the reduction in domestic sales. The nation as a whole will gain in paying a lower price for the import, even though the after-tariff price to consumers is somewhat higher. The lower the foreign supply elasticity, the higher the optimal tariff rate. The tariff is certain to produce net gain only if the foreign governments do not retaliate with tariffs on our exports.[21]

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[18] Kindleberger, ch. 4 (1978); Linder (1967); Morrall (1972).

[19] Alchian and Allen, ch. 37 (1972); Samuelson, ch. 35 (1976).

[20] Kindleberger, ch. 6 (1978); Yeager and Tuerck (1976).

It is not difficult to estimate the overall national loss from a tariff (adding up strictly private gains and losses). The only information needed is the percentage price mark-up of the tariff, the initial dollar value of the import, and the percentage elasticity of the import to price changes. The inquiry is much the same as estimating the impact of a sales tax.

An economist, Harry Johnson, in 1960 reached the surprising conclusion that the value of the gain from removing all 1960 U.S. tariffs would be a positive but trivial share of the Gross National Product.[22] Conversely, the net loss from the existing tariff structure was less than one percent of G.N.P. Later empirical studies confirm this significant conclusion: estimated losses in 1971 from all barriers on trade in the U.S. remained less than one percent of Gross National Product.[23] These studies establish that tariff barriers impose net costs but the total is not significant. Moreover, these estimates do not include transition costs that result from tariff reductions. Hence, the less than one percent gained from removing trade barriers is reduced by the substantial displacement costs associated with tariff reductions. In light of these modest amounts, one may question how much political and social divisiveness a nation should incur over the question of tariffs and trade barriers.

These findings caused consternation in the community of free-trade economists and they searched for qualifying factors. Some of the factors they found are difficult to quantify, such as the observation that price elasticity is greater in the long-run and therefore demand for lower priced imports and hence consumer gain might increase over time. Other factors are make-weights, such as the administrative costs of a trade barrier. It costs money to operate a tariff system. but it is also costly to administer a system of foreign trade, with or without tariffs.

At least two additional variables further reduce the cost of tariffs. A tariff affects the currency exchange rate in a way that can cut the welfare costs of the tariff. After exchange rate adjustments from fewer dollars being spent on imports, the tariff may end up raising the dollar price of imports by less than the amount of the tariff itself. For example, if a ten percent tariff causes the dollar to buy three percent more of each foreign currency, the domestic dollar price of importable goods will rise only about seven percent. If so, then the national loss from the tariff would equal but seventy percent of the usual measure of national loss.[24] Finally, tariff changes bring displacement costs, which further reduce or eliminate the gains from freer trade.

The final argument free-trade advocates make in response to the demonstration of modest losses from tariffs is that one percent of GNP equals a large number of dollars, ten billion in 1971. Given the size of the U.S. economy, and the social and political costs of changes in tariff policy, the amount may not be significant. Some economists also suggest that tariff protection may impede technological progress by reducing the incentive to produce domestically at lower costs through innovation. This speculation has been countered by a contradictory view, associated with the work of Joseph Schumpeter and John Kenneth Galbraith, that higher profit margins can accelerate technological improvements by giving firms greater resources and security for spending on research and development.[25] Uncertainty over tariff changes, further, is thought to reduce investment in research and development by import-competing American firms.

II. Modern trade theory reveals that trade policy changes result in wasted machinery and unemployment and that these costs may exceed the benefits of more trade

We may conclude from the above that accepting the myriad of assumptions in the pure theory of international trade, that theory provides a far weaker case for trade over no trade than is commonly supposed. We now turn to modern economic writings that qualify pure theory. Modern economists observe that orthodox theory provides an inadequate analytical basis for current issues of national commercial policy because of its unduly restrictive institutional and behavioral assumptions. Some question whether the two country-two goods model is adequate to explain multination, multicommodity trade patterns. The model predicts trade in the most advantageous-least advantageous products. But there is a range of products in between for which the model is indeterminate and other considerations might influence trade, e.g., a nation's long-run balance of payments.[26]

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[21] Kindleberger, ch. 7 (1978).

[22] Johnson (1960).

[23] McGee (1972); Kindleberger, 120 (1978).

[24] Kindleberger, 123 (1978); Stern (1971).

[25] Kindleberger, 122 (1978).

More fundamentally, economists note that classic theory is a timeless and static one that compares states of trade and notrade as if nothing of concern happens in between. These economists argue for a more dynamic trade theory that accounts for the transition stage that follows from any change in trade policy. The disparity in costs and benefits in short-run and long-run states may be significant; the economic disruptions and disturbances in transition periods are too large to be ignored. Once one ceases to assume that an economy can move into a new steady state after without wastage of resources, machines and labor, the net results of trade, even calculated with a flawed yardstick, may well be negative. Or the gains may be small. And the stability of trade patterns after policy changes becomes critical to the realization of benefits, however measured.

A. The effect of trade on machinery and capital

A group of British economists, Metcalf, Steedman, Mainwaring and Emmanuel,[27] have argued that traditional trade theory based on static equilibrium models does not account for the role of intermediate factors of production in either world trade or domestic production. Traditional theory focusses on fixed amounts of simple inputs—capital or labor—which costlessly move from one productive industry to another as free-trade alters a nation's domestic output. A dynamic theory deals with the effects of trade on the productive process and its stock of intermediate goods, the produced means of production.

As in the American chinaware industry, actual production entails a large quantity of intermediate goods rather than simple inputs of capital and labor. These goods represent significant amounts of investment capital earning at least a normal rate of return prior to trade. One may not assume that this "old" physically specific capital stock of productive inputs can be costlessly transformed into "new" physically specific captial stock to be employed in producing some other good. Similarly, if the total economic value of the new capital stock (intermediate goods) is less than the old, one may not assume that the difference in economic value can be transformed through trade into consumer goods of equal value. In short, transitions from changes in trade policy involve junking of industry specific capital inputs and this unwanted capital is not transformed into consumer goods, as pure theory posits. If the costs of dismantling-erecting or transporting these intermediate goods are sufficiently high, as they are most often apt to be, their value cannot be realized in any market. If they are industry-specific, they cannot be transformed into expanding export sector of the economy. Once the loss on these non-malleable capital goods is taken into account, the net aggregate effect of a move toward freer trade may be negative. Community welfare may be worsened. At a minimum, the net gain will be far less than the amount posited under pure theory.[28]

The extent of such loss in captial values will depend on the predictability and magnitude of the change in trade policy and consequent trade. Losses are most severe where the change in trade policy arises unexpectedly and the amount of consequent imports is substantial and unforeseen. Observe that U.S. trade agreements with communist nations tend to be less foreseeable and less gradual than those with market economies and that the imports from an SCE are not predictable, either in kind or quantity. Phasing in trade policy changes over a substantial period of years reduces capital losses. The loss also is less if the stock of capital goods can continue to produce a value of net output in excess of declining wage costs. In theory, wages should fall in the distressed industry. If wages are sticky, however, labor costs will hasten the decline of the import competitive industry. Capital losses are greatest in the case of plant closures.[29]

A dynamic trade theory also observes the effects of uncertainty and expectations over trade policy in the import competitive industry. Inability to predict trade policy changes or the amount of consequent foreign trade will discourage modernization and change in import-competitive industries.

These conclusions of possible net loss from a freer trade policy are based solely on private economic costs, which is a restrictive view of transition costs. It assumes social costs do not exceed private ones. But the calculation of private costs does not include such trade impacts as community and regional disruption from the decline of import-competitive industries; the relationship between an increase in unemployment and social unrest, crime, mental illness, family disharmony and break-up, and so forth. If there are causal relationships between concentrated trade-related economic disturbances and these effects, the economic calculus of cost is too narrow. Social costs would be in addition to private costs. Social costs are explored later in this paper.

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[26] Kindleberger, 55–56 (1978); Samuelson, ch, 5 (1976). For writings critical of the pure theory, see Gray (1976); Steedman (1979); Morrall (1972); Lipsey (1976); Reich (1982).

[27] Steedman, el al. (1979).

[28] Id., ch. 4 and 12.

[29] Id. ch. 12.

Free trade advocates may not gainsay capital losses from changes in trade policy. In taking a narrow view of industry-specific factors and making a host of assumptions of idle productive facilities in import competitive industries, they generally conclude that such capital losses are modest. They also argue that such losses are similar, but far less than, the losses sustained as a result of technological improvements in the production of goods. But they do not often observe that the gains from technology are significantly greater than the gains from trade.

Most economists would agree trade policy changes should be predictable and gradual; reductions in tariff levels or other trade barriers should be phased in to allow for orderly termination of a declining import-competitive industry.[30] In addition, economists gingerly support other adjustment assistance measures. While agreeing in principle with adjustment assistance as a legitimate social policy to alleviate concentrated losses, they find that U.S. adjustment assistance programs maintain inefficient industries at existing levels of output instead of facilitating their orderly demise. They further observe that it may not be feasible to design effective adjustment assistance so as to insure the depletion of industry specific capital stock while cushioning the loss.[31]

B. The harms to workers from trade policy changes

Economists also deal with the effects of trade on the American labor force, both in theory and empirical studies. First a classic theory, a disturbing one not fully realized in the real world. Under certain restrictive assumptions, the Stopler-Samuelson theorem holds that moving from no-trade to free-trade unambiguously raises the returns to the factors used intensively in the rising-price export industry and lowers the returns to the factors used intensively in the falling-price import industry. Because the resulting change in factor rewards is much greater than the change in the relative price of goods, this result does not depend on which goods are consumed by households of workers and owners in these industries. Cheaper imports do not offset wage and capital losses in import-competitive industries.

Samuelson also established the remarkable factor-price equalization theorem. Again under restrictive assumptions, free trade will equalize not only commodity prices, but also international factor prices, so that all workers in trading nations will earn the same wage and all units of land in such nations will earn the same rental return, regardless of factor supplies or the demand patterns in the trading countries. The theory posits that in the long run workers will end up after trade earning the same wage rate in all countries, even if labor migration is not allowed. Trade makes this possible, because the factors that cannot migrate between countries end up moving among trading nations in the form of goods. It is as though each factor of production were migrating toward the country in which it was scarcer before trade.[32]

The most casual glance at the world reveals that this prediction is not reflected in experience. The assumptions behind it depart from reality. But the theorem has a germ of analytic power in it: trade diminishes the differences in factor prices; wages tend toward equality.

Trade produces more visible short-run effects on labor. Lower wage rates in countries exporting goods to the U.S. plainly affect employment levels and wage rates in the U.S. Workers specialized in export and import production will clearly gain and lose from expanded trade, and their consumption patterns will not significantly alter the gains and losses.

The Leontiev paradox provoked empirical studies of the export and import competing factors of production in the U.S.[33] Hence, there is considerable data on the impact of trade upon the distribution of income in the U.S. As the simple model predicts, trade alters relative commodity prices here and abroad and therefore raises the rewards of some productive factors at the expense of others. It makes some producer groups, including workers, better off and others worse off. It follows that the more labor is specialized or concentrated in the production of imports, the more it stands to lose from increases in trade.

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[30] Amacher, Baldwin essay, ch. 4 (1979); Reich (1982).

[31] Samuelson, ch. 34 (1976); Amacher, Tumlir and Balassa Essays, ch. 4 (1979); Mussa (1974).

[32] Stolper and Samuelson, reprinted in Bhagwati (1969); Kindleberger, ch. 5 (1978).

[33] Baldwin (1971); Brimmer (1972); Amacher, Baldwin essay 227-229 (1979); Frank, ch. 3 (1977); Black ch. 5 (1980).

To measure the specialization of labor in export and import sectors in a multicommodity real world requires detailed information about particular products, industries and inputs. One needs elaborate input-output information in order to ascertain what shares of export and import competing production consist of payments for workers in industries that supply goods to domestic export and import industries. Further, to assess the overall effect of changes in trade policies on employment (the number of jobs available at given wage rates), one must quantify the extent to which reducing (or increasing) imports would decrease (or increase) the value of U.S. exports and then to multiply such changes in import-export values by the ratio of jobs per dollar that seem to characterize import and export sectors.[34]

The considerable number of variables, estimates of demand elasticity, output coefficients and other elusive matter, as well as the assumptions necessary, render job-effect estimates both rough and highly susceptible to bias in favor of a researcher's initial intuitions.

There are several such studies for the U.S. and they generally conclude that a policy curtailing existing levels of imports would bring a net loss in U.S. jobs and wages because of the effect on exports.[35] In reaching this conclusion, the critical assumption is that a new U.S. trade barrier reducing the value of imports will reduce the value of exports by the same amount. Several reasons are invoked to support this connection: exports use importable inputs; foreigners who lose U.S. markets will buy less U.S. exports as a consequence of their decreased incomes; foreign governments may retaliate against our exports; and, most importantly, cutting imports will bring the same reduction in export value through money exchange rate adjustment. With flexible exchange rates, the supply of dollars to buy foreign goods will roughly match the demand for dollars to buy U.S. goods. New import barriers will reduce the volume of dollars being supplied for foreign currencies. Consequently, the value of the dollar will tend to rise (and the value of foreign currencies will tend to fall) in exchange markets. Accordingly, any dollar price of a U.S. export now becomes more expensive to foreign buyers and they, therefore, will tend to cut their purchases of exports. Hence, exports will decrease with imports through foreign exchange adjustments.[36]

Accepting the assumption of equal reductions of U.S. imports and exports, economists argue that the job impact of a new trade barrier would be harmful to American labor. Several empirical studies show that since World War II there have been more jobs tied to a billion dollars of American exports than to a billion dollars of import-competing production. Recall Leontiev's finding that U.S. exports are more labor-intensive than its imports. Further, the average wage rate for workers in export industries tends to be higher than the import-competing industries, since export industries are human capital intensive. Hence, the estimates imply that more overall dollar wages are tied to exports. The authors of these studies concede that job effect estimates are gross. Nonetheless, they argue that the evidence indicates that jobs and wages would be cut by an import reduction matched by a corresponding reduction in exports.[37]

By focusing on the impact of a reduction in existing trade barriers instead of imposition of new ones, Baldwin recently found a modest overall decrease in American jobs, even after allowing for a corresponding export expansion.[38] In estimating the impact of a 50 percent multi-lateral duty reduction by the U.S. and its major trading partners on most goods (except the big specially protected ones, e.g., steel, textiles), Baldwin finds a net loss in U.S. employment equaling 15,400 manhours per annum. (He also finds a net welfare gain of over $1 billion.) Significantly, Baldwin reports a number of concentrated and severe adverse employment effects in particular import-sensitive industry sectors: (food utensils and pottery 20 percent; rubber footwear 13 percent; cutlery 12 percent). He also observes certain capital losses in import-competing industries.

Although Baldwin's estimate of a net change of 15,400 manhours from a 50 percent across-the-board tariff reduction may not be a formidable figure in the aggregate,[39] the overall transfer of jobs from import to export sector industries is large indeed. He forecasts an increaseof 135,800 manhours in the export sector and a decrease of 151,200 manhours in the import sector. This impersonal statistical aggregate does not reveal or suggest the effects on workers on their families who suffer the impact of displacement and the losses to managers and shareholders in import industries. Similarly, the figures do not consider the social benefits of maintaining or increasing employment in import-competing sectors with their high proportion of unskilled labor.

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[34] See Kindleberger, ch. 5 (1978); Amacher, Baldwin essay (1979).

[35] *Id.;* Baldwin, American Economic Review (1971); Krause (1971).

[36] Kindleberger, ch. 5 (1978).

[37] See authorities in note 27, *supra.*

[38] Baldwin, Mutti, and Richardson, Welfare Effects on the U.S. of a Significant Multilateral Tariff Reduction: A Progress Report, Conference on Trade, Univ. of Wisconsin, 1977, reprinted in Amacher, ch. 4 (1979).

More fundamentally, in quantifying gains and losses, the labor displacement costs of a tariff reduction appear to have been underestimated in the Baldwin study. Where an import-competitive industry lays off workers, such workers do not simply move to some other productive employment with virtually the same marginal product. They do not find work elsewhere at the same pay. People's next best alternatives usually are well below their best ones, especially if they have become committeed to their current employment by gearing their choices of residence and personal skills to that employment. It is well known that displaced workers sustain prolonged income losses while trying to find new jobs and suffer lower pay on new jobs as well. These displacement costs must be considered when toting up the net effect of tariff changes and they appear to the lay observer to be far larger than Baldwin's estimates.

Similarly, managers and shareholders in import-competitive industries experience capital losses due to competition from imports. All of these losses are real economic losses to society. Even if, contrary to fact, domestic assistance programs were to pay full compensation for private income and capital losses, the economic costs would not disappear. The loss would be socialized through taxation.

As one writer on international trade recently observed, "recent studies have shown that in some cases the estimated displacement costs have been great enough to cancel out the gains from tariff removal and that in other cases they have offset only part of the gains from freer trade." [40] As one would expect, economists observe that these costs are considerably magnified in an economy beset by sluggish economic growth, underutilized capacity, and considerably less than full employment. Shifts in such an economy from declining industries to growth sectors are torpid; new industries do not spring up of their own accord to replace contracting ones. Instead, the U.S. (and other countries) faced with competitive declines across many industries experience increased unemployment and underutilized industrial capacity, made worse by fiscal and monetary policies aimed at curbing inflation.

Displacement costs are what differentiates the case against removal or reduction of existing tariffs from the case for imposing new tariff barriers. In imposing new barriers, adverse employment effects in export industries would introduce another set of displacement costs and these would increase the estimated national losses from new tariffs. Hence, displacement costs are a factor weighing against new tariff barriers. But they similarly counsel against substantial reductions of existing tariffs or other trade restrictions. Further, existing tariffs are particularly significant barriers to high displacement costs because they are most restrictive on goods that have above average domestic job content, mostly in the least-skilled labor categories, such as cotton textiles and footwear.[41]

C. The harms to society from trade policy changes

Economic studies on labor effects exclusively set forth private costs and benefits and assume that they also represent social costs. To account for social costs and benefits, it is necessary to yield the simplifying assumption in trade theory that demand and supply curves can do double duty as the measurement of both private and social benefits and costs. The demand curve is supposed to represent not only the marginal benefit of an extra motorcycle to the private buyer but also the net benefits of another cycle to society. Similarly, the supply curve represents not only the marginal cost to private producers of producing another cycle at home but also the marginal cost to society as a whole.[42]

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[39] Major nontariff barrier items are omitted from the calculations, including oil imports, textiles, agricultural products and items covered by quotas, escape clause actions, and variable levies. If these were included, Baldwin estimates a net loss to the U.S. of 108,000 jobs and a deficit welfare effect of $710 million. Id.

[40] Kindleberger, 125 (1978). For the AFL-CIO position on trade, see Chalkin (1982) and Weinberg, in Amacher, 307 (1979).

[41] Baldwin, note 31, supra. A survey of tariff literature is found in R. Stern, 857-88 (1971).

[42] Kindleberger, ch. 7 (1978); Lipsey and Steiner, ch. 39-40 (1966).

The critical assumption is that there are no gaps or distortions between private and social gains and losses from any activity. But there happens to be many such distortions in our domestic economy and they need not cancel each other out. These include the wide range of effects from economic activities that economists call "externalities" or "spill-over effects." They are net positive or negative effects on parties other than the buyer and seller in a marketplace. Pollution is a classic example of costs imposed on persons not parties to an exchange transaction. Absent regulation, these costs are not reflected in the production costs or price of a good. In short, in a "second-best" world with gaps between private and social costs and benefits, private actions need not lead to a social optimum.[43] Freer trade arguments are both incomplete and indeterminate unless they account for the externalities of international trade.

Let us suppose, for example, that jobs in a certain import-competing industry or sector will or does generate greater returns for society than are perceived by the people in those jobs and by people deciding whether to take them. This can occur, for example, where the jobs bring gains in knowledge and skills, or changes in attitudes, that benefit persons in addition to the workers and employers in that sector. Government employment programs aimed at training and instilling work habits are premised on just such benefits. Or it may be the case that the short-run costs of taking jobs in this sector seems higher to potential workers than they do to society as a whole. For these and related reasons, the social costs of attracting workers into the sector may be lower than the wage rate the firms in the sector would pay their workers. This is a case for policy devices to keep and attract workers to the sector.[44]

Such a gap between private and social costs of maintaining or creating jobs can render a tariff beneficial. Tariff protection will encourage firms in this sector to expand output and hire more labor. The social benefits of the extra jobs, or maintenance of the existing ones, can outweigh the losses caused by the fact that consumers, or firms, are paying more for the product at home than they would pay without a tariff. Consumer surplus is not the only good we seek to produce.

Once one appreciates that private and social costs commonly diverge, there is little an economist can say in the abstract about the net gains or losses from a tariff. Each case must be judged on its own merits, through examination of the social costs of a decrease in employment of a particular group of workers in an industry and the social benefits of maintaining jobs in that sector. Assume, for example, that an industry employs employees, with limited skills, or highly industry specific skills. Such employees necessarily would encounter difficulties in finding alternative employment, and would receive less pay in whatever jobs they might find. Society may derive substantial benefits from such workers being employed in their present positions and therefore would suffer substantial harms in their being unemployed or employed in lower paying jobs. Maintenance of an existing tariff would be an effective way of expressing these social benefits and costs.

Free-trade advocates do not gainsay the possibility of such social costs and benefits. But they would find a different solution in the specificity rule: it is more efficient to adopt policies that are least market disruptive and that are closest to the locus of the distortions separating private and social benefits or costs. Applied to the above, the locus of the problem is domestic production, not imports or consumption of imports. If encouraging domestic production is the objective, a direct subsidy for production, or lower taxes, tied to the number of workers in the industry, is the appropriate social response. The subsidy is preferable to a tariff because it does not discourage consumption of the good by raising its price. Similarly, if the object is to create jobs and cure unemployment throughout the entire domestic economy, economy-wide expansionary measures—fiscal or monetary policy—is preferable to protectionist measures. If the distribution of income after trade is the problem, tax and transfer programs is the appropriate specific intervention. And so forth.[45]

Free-trade economists largely run out of things to say when faced with the response that political or other constraints in a second-best world prevent adoption of these "specific" measures. They also rarely observe that these specific measures have their own special externalities or social costs (e.g., cash transfer programs are politically divisive).[46]

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[43] See generally, Little, I., ch. XIII (1957); Calabresi (1970).
[44] Kindleberger, ch. 7 (1978); Bhagwati (1969); Johnson, in Baldwin ed. (1965).
[45] Id.; Samuelson, ch. 34 (1976).
[46] Calabresi and Bobbitt, ch. 4 and 5 (1978).

D. Displacement costs in a slow-growth economy

Public or political choice literature on trade policy indicates that during a sustained economic recession, nations may opt either for greater protectionism or freer trade, depending on which is viewed as a more promising stimulus for recovery. Historically, the U.S. has chosen protectionist measures as a means of dealing with severe unemployment; witness the forbidding Smoot-Hawley tariffs adopted in 1930. Recent writings on the political economy of tariffs emphasize the importance of domestic pressure groups in lobbying for changes in trade policy. In periods of high employment, export and import industry sectors are in conflict over tariff changes, since the income redistribution effects of tariffs are greatest in a full employment economy. Conversely, when unemployment is widespread, policy-induced changes in income shares become less important than their effect on the total level of income. All groups typically benefit from a policy that raises domestic output. Hence, changes in tariff policy—new or higher tariffs—may meet less resistance from export sectors when resources are underemployed. Underemployment creates a political environment sympathetic to policies reducing foreign imports as a means of stimulating domestic production.[47]

Typically, free trade advocates invoke the standard macroeconomic solutions to unemployment and underutilization. But these have been notably unsuccessful in this country during the last decade in promoting economic growth and full employment.[48]

As a last resort in the argument for freer trade and against protective measures, some economists call for a new form of "managed" trade adjustment to compensate economic groups who would be threatened with a disproportionate share of the burden of economic change caused by trade. Robert Reich [49] finds that our present programs of adjustment assistance are largely protectionist in operation and effect. They extend periods of unemployment rather than facilitate job change and perpetuate declining industries rather than phasing them out. Instead of these programs, he calls for a new bargaining relationship between the government, business and labor to accelerate adjustment and coordinate the pace at which the firms, workers and communities adjust relative to one another.

The point about this proposal is that it well recognizes the substantial harms from trade in a slow-growth economy and the inadequacy of present adjustment measures. It provides, however, as the only alternative to protection, a novel and unprecedented form of government intervention in the American economy. To be sure, Reich finds precedent for such intervention in other countries, notably Japan and West Germany. But many people in this country would view such government intervention in the economy as a substantial cost of detriment of moves toward freer trade. If that is what is necessary to have more imports, one may question whether it is worth the price. To the impressive list of costs set forth above, we may add increasing collectivization of the American economy as an adjunct of moves toward freer trade.

In response to this concern, which he deems outdated ideology, Reich observes that "no clear distinction exists between private and public sectors within this or any other advanced industrialized country; the two sectors are completely intertwined. . . . The tenacity with which the free market ideal is maintained illustrates the power of ideology over political reality." [50] Most Americans, especially today, would accept neither this collapse of the distinction between public and private sectors nor more government intervention in the economy premised on this conflation.

III. American antitrust laws embody principles of fair import competition but the protection afforded is illusory

Put most generally, American antitrust law is aimed at preventing domination or undue concentration in any sector of interstate or foreign commerce of the U.S.; at preventing the use of market power to limit competition in prices, production, market or trading conditions; at checking other exercises of economic power which restrict opportunities or freedom of entrepreneurs; and at ensuring fair competitive practices.[51] Economic efficiency premised on free competition in all relevant markets is, of course, an ultimate objective.[52]

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[47] Adams, ch. 1, 8, 9 (1979); Hudec, in Interface Two (1982); Baldwin, in Amacher, part 4 (1979); Downs (1957); Kindleberger, ch. 12 (1978).

[48] For the standard free trade economic prescription, see Samuelson, ch. 35 (1976). But see Lipsey and Steiner, 457-59 (1966).

[49] Reich (1982).

[50] Id. at 878 (1982). Reich also provides a sharp attack on "equilibrium" economics. Equilibrium "is a vanishing mirage on a constantly shifting horizon. The process of adjustments is the stuff of economic and political history." Id at 879.

More basically, these laws express a familiar and typically American distruct of unchecked or concentrated power. In this view, antitrust is the economic analogue to our complex constitutional system of checks and balances in the political sphere; hence, the references to the Sherman Act and our antitrust laws as the constitution or Magna Carta of the American economy and Judge Hand's observation in Alcoa: "It is possible, because of its indirect social and moral effects, to prefer a system of small producers . . . to one in which the great mass of those engaged must accept the direction of the few." [53]

An array of antitrust statutes are applicable to "foreign commerce" and several are aimed particularly at import competition in American markets. Sections 1 and 2 of the Sherman Act, and certain provisions of the Clayton Act and F.T.C. Act, apply to activities "in" or "affecting" American foreign trade or commerce, which includes both exports and imports. Any contract, combination or agreement in restraint of trade, or attempts to monopolize such trade, even those involving only foreign firms, may violate the antitrust laws if they affect commerce in the U.S. The crucial questions are whether the forbidden results or impacts occur within the United States and also whether the defendants can be brought before a federal tribunal.[54]

The Wilson Tariff Act declares unlawful combinations in restraint of trade relating to the importation of articles from a foreign country. It has been interpreted as a reiteration that Sherman Act standards apply to foreign imports.[55] Section 5 of the Federal Trade Commission Act applies to unfair methods of competition "in or affecting" U.S. commerce, which includes international trade, even though the F.T.C. has not applied it to import competition.[56] Further, a little known statute, Section 337 of the Tariff Act of 1930, proscribes unfair methods of competition in the importation and sale of imported goods in the United States and vests in the International Trade Commission (I.T.C.) authority to investigate and adjudicate complaints under the Act; relief, however, is subject to a presidential veto. Although the I.T.C. had limited application to instances of patent infringements by imports, the agency has been persuaded by the 1974 amendments that the statute covers the full range of anti-competitive practices under the Sherman Act and other antitrust laws. Hence, in a notable recent decision, the ITC asserted jurisdiction and approved a settlement of a complaint charging Japanese television manufacturers with predatory pricing and conspiring to monopolize the sale of television sets in U.S. markets.[57] I.T.C. antitrust jurisdiction substantially overlaps with that of the Department of Justice and the Federal Trade Commission.

A long forgotten antitrust statute, the Anti-Dumping Act of 1916, recently has engendered controversy through invocation in in two import competition challenges. This Act, the initial anti-dumping statute applicable to imports, prohibits the systematic importation of goods at a price "substantially less than the actual market value or wholesale price of such articles in the home country or in third countries to which they are commonly exported." [58]

Antitrust decisions concerning foreign producers and international transactions generally confirm that antitrust principles governing imports and exports do not differ from the rules applicable to domestic competition. Although the Webb-Pomerene Act of 1918 [59] qualifies the application of the Sherman Act to American export businesses, Sherman Act cases prohibit American companies from making anti-competitive arrangements in regard to the distribution of their goods in foreign markets,[60] and similarly bar agreements among American and foreign producers to divide up world markets or otherwise restrict competition in U.S. or foreign markets.[61] Price-fixing between American and foreign firms on imports and exports is illegal per se. Acquisitions by American companies of potential foreign competitors and acquisitions by foreign producers of American companies are subject to antitrust scrutiny, especially where foreign firms are potential competitors in concentrated American markets. Indeed, even a merger of two foreign companies, is not, in theory, immune from American antitrust where there is an impact on American markets.[62] Accordingly, the actual and potential application of American antitrust to international transactions is vast, a recognition that led the Department of Justice in 1977 to publish a 63-page "Antitrust Guide for International Operations."

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[51] The "populist" position can be found in L. Schwartz, Book Review (1979); Sullivan, L. (1977); Neale (1980). Among the best known of the lawyer-economists are Arreda, P. & Turner, D., Antitrust Law (1978); Posner, R., Antitrust Law (1977). See also Gellhorn (1980).

Perhaps because of the illusion of precision and objectivity in economic analyses, the economic approach to antitrust has been a growth industry during the last decade. But competing voices are not absent.

[52] Schwartz, L. (1980); Sullivan, L., ch. 1 (1977).

[53] The quote is from United States v. Alum. Co., 148 F.2d 416 (2d Cir. 1945). See also Schwartz, Book Review (1979).

[54] See Neale,. ch. XI (1980); Sullivan, 714 (1977).

[55] 15 U.S.C. sec. 8–11 (1976); see Outboard Marine, 407 (1978), and cases cited therein.

[56] 15 U.S.C. sec. 45(a)(1) (1976); Joelson at 106–07 (1980).

[57] Musrey, A. (1980); Minchew, D., Symposium on Section 337 (1978); Barringer (1979).

[58] 15 U.S.C. sec. 72 (1976); see Zenith Radio Corp. decision (1980); Schwartz, L. (1980).

[59] Joelson at 107 (1980).

[60] E.g., *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

These antitrust decisions, however, deal with familiar forms of anti-competitive agreements and practices that create artificially high prices for products in American and foreign markets.[63] Except for two novel lawsuits in the 1970's, American courts have not confronted antitrust issues arising from low price imports. These two cases, and commentary on them, reveal that U.S. courts, the Department of Justice and antitrust commentators are decidedly unreceptive to claims of American producers suffering losses from low-price imports, including imports from a state-controlled economy. In addition, the extraordinary complexity and protractedness of these judical proceedings suggests that antitrust is not an inexpensive, simple, or expeditious remedy for American producers injured by low-price imports.[64]

Outboard Marine Corp. v. *Pezetal* substantially expores the issues involved in applying American antitrust law to imports from state-controlled economies. Relying on exceedingly low prices and an effective marketing apparatus, Pezetal, a Polish producer, succeeded within a few years in gaining 35 percent of the U.S. market for electric golf carts. An American producer, Outboard Marine, filed a complaint with the Treasury Department charging a violation of the anti-dumping laws and concurrently sued under the antitrust laws for treble damages—profits that OMC would have made but for Pezetal's allegedly unlawful activities. Relying on the Sherman and Wilson Tariff Act, OMC charged Pezetal with conspiring with its subsidiary and U.S. distributors to "restrain" and "monopolize" U.S. commerce in golf carts through use of predatory prices and territorial restrictions.

OMC confronted formidable obstacles in relying on a familiar predatory pricing claim. Predatory pricing—a sustained sales campaign at below-cost prices to eliminate competition—has been exceedingly difficult to establish in domestic antitrust controversies. Proof of production costs is elusive and judges or juries are reluctant to believe that low prices will disappear tomorrow. In addition to these ordinary difficulties, OMC had a special problem: it could not establish an intelligible cost of production for Pezetal because in a non-market economy meaningful price data are not available and input costs are not ascertainable. OMC charged price discrimination as well, but Pezetal's golf carts were sold exclusively in the United States.

In emphatically rejecting the predatory pricing claim, the district judge refused to "devise a different measure of predatory pricing (i.e., one not related to the producer's cost) applicable to foreign commerce subsidized by state-controlled economies. . . . Whatever threat subsidized foreign commerce may pose to its American counterpart, plaintiff's argument calls for a perversion of both the judicial function and the antitrust laws.

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[61] E.g., *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); Neale, at 336–42 (1980).

[62] See *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975); Neale at 344–49 (1980). Section 7 of the Clayton Act bars the acquisition by a corporation engaged in U.S. commerce of stock or assets of another corporation also engaaged in U.S. commerce where the effect may be anticompetitive "in any line of commerce in any section of the country."

[63] See Neale, ch. XI (1980); Joelson (1980); Schwartz, Interface Two (forthcoming 1982).

[64] The Japanese electronics case began in 1971. Pre-trial summary judgment motions were not decided in the district court until about ten years later. 494 F. Supp. 1190 (E.D. Pa. 1980); 513 F. Supp. 1100 (E.D. Pa. 1981). All major issues are pending on appeal. Id. Outboard Marine was commenced in 1977 and it too apparently has not yet gone to trial on the one claim not dismissed in summary judgment proceedings. 461 F. Supp. 384 (D. Del. 1978); 474 F. Supp. 168 (D. Del 1979).

Section 337 of the Tariff Act of 1930, as amended in the 1974 Fair Trade Act, also is a potential basis for antitrust challenges to cheap imports. Enforcement jurisdiction is in the International Trade Commission, subject to judicial review and presidential veto of relief. Unlike the F.T.C., however, the I.T.C. deems its jurisdiction to be mandatory; private complaints must be investigated and proceedings commenced where the complaint has apparent merit. Over the opposition of the Justice Department and the F.T.C., the I.T.C. construes section 337 to cover all manner of offenses under other antitrust statutes and some additional conduct that may not fall within other statutes. In the I.T.C.'s view, section 337 is the mainstay of antitrust in respect to unfair competition from imports. Various views of section 337 are set forth in Minchew, ed., Symposium (1978).

"It is the function of the courts to interpret existing law—not to usurp Congress by providing protectionist legislation for American businessmen when the latter perceive a need. . . . Although plaintiff is injured by defendant's capability to offer lower prices as a result of foreign government subsidies to manufacturer Pezetal, the court concludes that the antitrust laws do not provide a remedy for such loss." [65]

The court was similarly unreceptive to the monopolization charge. Although thirty-five percent was sufficient market power for attempted monopolization, the court ruled that Pezetal's prices and production costs were irrelevant to showing that it acted with an intent to monopolize:

"That Pezetal's competitive advantage results from a government subsidy by a controlled economy that permits defendant to offer virtually identical products at a cheaper price is not actionable under Sherman Act Section 2. . . . Certainly a firm that exploits the opportunity through technology, cheap labor or a government subsidy to offer the same product at a reduced price can be said to be responding normally to market opportunities." [66]

Finally, the court dismissed the Anti-Dumping Act claim by holding that there could be no price discrimination where the product was not sold in a home or third country market.[67]

In *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*,[68] a truly massive antitrust action initially filed in 1971, the plaintiff charged Japanese television and electronic manufacturers with participating in a conspiracy which "by artificially lowering export prices, has for more than twenty years sought the methodical destruction of the United States consumer electronic products industry." Alleged offenses ran the gamut of American antitrust law, including a seminal claim under the 1916 Anti-Dumping Act,[69] which provoked the first judicial examination of the statutés legislative history, language and framework.[70]

Relying on legislative comments about difficulties in proving predatory intent to injure in the later enactment of administrative anti-dumping remedies in 1921, commentators had assumed that the intent requirement was the reason for desuetude of the 1916 antitrust statute. But this is not persuasive. The Robinson-Patman and Sherman Act similarly require proof of intent to injure competition, but that has not been a paralyzing obstacle to enforcement. Indeed the intent to injure has been easily satisified under Robinson-Patman, the domestic price discrimination statute. That American producers viewed the administrative dumping remedies as a cheaper and speedier alternative to private antitrust litigation is probably a more plausible explanation for the virtual non-use of the 1916 Act.[71]

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[65] 461 F. Supp. at 400.

[66] Id. at 405. Territorial restraints, such as those used by Pezetal, once were but are now no longer per se illegal. Contintental Television v. G.T.E. Sylvania Corp., 433 U.S. 36, 48 (1977). Depending on their purpose and operation, they may be evidence of an intent to monopolize under Section 2. Hence, the bare survival of that claim in *Outboard Marine*. The court had severe doubts, however, that Outboard Marine could establish from the territorial restrains of Pezetal the requisite intent and compensable injury to itself, since absent the assignment of territories to U.S. distributors, Pezetal's prices would have funneled sales to other Melex dealers, not Outboard Marine. 461 F. Supp. at 406

[67] 461 F. Supp. 408–09. The bare survival of the monopoly claim is not without significance, for it allows OMC to utilize the powerful discovery procedures available to it under the Federal Rules of Civil Procedure and to subject Pezetal to extensive inquiry regarding its business practices. State-controlled economies such as Poland likely would view inquiry into the details of their economic planning and production as unacceptable intrusions on state secrets. That, no doubt, will give rise to controversies over discovery.

Pezetal filed an antitrust counterclaim against Outboard Marine, charging a conspiracy to submit false information to the Treasury Department and customs service in anti-dumping proceedings in order to intimidate distributors and customers of Pezetal carts in the U.S. Although the court doubted Pezetal would prevail, it declined to dismiss the claim on summary judgment proceedings. 474 F. Supp. 168 (1979). One commentator finds considerable antitrust potential in such reprisal counterclaims. See Schwartz, Interface Two (forthcoming 1982).

[68] There are many citations to this case. They are collected in 513 F. Supp. 1100 (E.D. Pa. 1981).

[69] 494 F. Supp. 1190 (1980); Sidorsky (1981).

[70] Id.

[71] Early expressions of the view that intent was difficult to prove under the 1916 Act predate many of the Sherman and R/P Act decisions relaxing the intent requirement. Hence, these expressions are plausible and this position apparently did play a role in the enactment of the 1921 Anti-Dumping Act that dispensed with intent.

See U.S. Tariff Comm., Dumping and Unfair Foreign Competition in the United States (1919), excerpted in H.R. Rep. No. 479, 66th Congress, 2d session 2 (1919).

Senator Mathias has introduced a bill, titled the Unfair Competition Act of 1979 S. 938, 96th

Continued

The court in *Zenith* initially ruled that the 1916 Act is an antitrust statute outlawing price discrimination in much the same manner and for the same reasons as the much later Robinson-Patman Act (R/P). Therefore, the 1916 Act should be interpreted so as to render its reach and application co-extensive with Robinson-Patman. In other words, whatever R/P forbids in regard to domestic competition, the 1916 Act forbids in regard to import competition. Although R/P has had a mixed reception in the courts, and is a somewhat leaky statute, placing the 1916 Act on a par with Robinson-Patman attaches considerable importance to the obscure and seemingly moribund 1916 statute.

The parallel interpretation mechanism was used in *Zenith*, however, to reject the claim. R/P prohibits price discrimination where both sales occur in U.S. markets and calls for comparison of transactions in goods "of like grade and guality." Giving a parallel interpretation to the phrase "such goods" in the Anti-Dumping Act of 1916, Judge Becker refused to find that television sets sold in Japan were of like grade and quality with television sets exported to the United States, even though the goods did not differ in production costs or methodology. The sole differences were minor engineering adaptations, since Japanese electric power is supplied at different voltages and its broadcasting channels are located at a different part of the frequency spectrum.

Reliance on R/P in this case drastically circumscribes the availability of antitrust sanctions against discriminatorily priced imports. As a matter of sound statutory interpretation, the decision is dubious. Robinson-Patman criteria for measuring product comparability lose cogency when transplanted from domestic price discrimination law to the different context of antitrust dumping.[72]

Section 2 of the Sherman Act proscribing monopolization and attempts to monopolize trade is also potentially applicable to low-price import competition, as the courts acknowledged in *Zenith* and *Outboard Marine*. Possession of substantial market power and the elusive element of intent or purpose underlying the achievement of market power are the key components of this offense. Identifiable acts of exploitation or predation demonstrate intent, but practices concededly legal in themselves may support the requisite intent where shown to be part of an illegal scheme to obtain or maintain monopoly power. Needless to say, the line between vigorous competitive practices and acts aimed at eliminating competition is industinct and elusive.[73]

The decision in one of the many A&P cases well illustrates the sensitivity of American courts to concentrated market power in purely domestic controversies.[74]

Congress, 1st session, 125 Cong. Rec. 54303 (daily ed. April 10, 1979), that would amend the Anti-Dumping Act of 1916. The proposed legislation is aimed at eliminating the obstacles to enforcement of the 1916 Act. While Congress has recently enacted legislation as part of the Trade Agreements Act of 1979 that it is hoped will increase the effectiveness of the administrative procedures against dumping, S. 938 recognizes the need for making available to U.S. industries injured as a result of dumping a private cause of action for treble damages.

The administrative procedure under the 1921 Anti-Dumping Act and its successor legislation provides for prospective relief by adjusting the prices of dumped merchandise, but does not afford any remedy for past injury incurred by U.S. manufacturers. Dissatisfaction has been voiced by American industries at the ineffectiveness of the 1921 Act both because of lax government enforcement and failure to collect antidumping duties. The main feature of the bill is that it would replace the requirement of proving a specific intent to injure a domestic industry and instead require only that the importer have knowledge that the articles are being sold at substantially less than their price in the home market. The dumping would have to "necessarily and directly" injure an industry in the United States. The bill would recognize the 1916 Act as a bona fide antitrust law under sec. 1 of the Clayton Act and provide for injunctive relief as well as for treble damages. The bill does not alter the product comparison requirement of the 1916 Act, which the *Zenith* case has shown is likely to be a substantial bar to the success of future actions under the Act.

S. 938 and its relation to the 1916 Act was discussed in the Senate hearings on the bill held on Dec. 6, 1979. See Unfair Competition Act of 1979, S. 938: Hearing Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Congress, 1st session (1979).

Persistent underselling of competitors and a declining price structure in a product market suffice to establish the requisite intent under R/P. Utah Pie Co. v. Continental Baking Co., 396 U.S. 685 (1967). Neale, ch. VII (1980).

[72] See Sidorsky (1981).

[73] Neale, ch VI (1980); Sullivan, sections 33–51 (1977).

[74] *United States* v. *Atlantic & Pacific Tea Co.*, 173 F.2d 97 (7th Cir. 1949). See also *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam 347 U.S. 521 (1954); Sullivan, ch. 2 (1977). Recent decisions appear to provide more leeway for aggressive competitive practices, notwithstanding their exclusionary effects. *Berkey Photo* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979; *Telex Corp.* v. *I.B.M.*, 510 F.2d 894 (10th Cir. 1975).

On the retail side, A&P was shown to have obtained different rates of return from its stores depending on the degree of competition they faced in various locales. A&P's selective prices, however, were not shown to be predatory, i.e., below costs. On the buying side, A&P used its considerable leverage to obtain lower wholesale price than those available to its competitors. The Circuit Court found that the price concessions obtained from suppliers were used to finance "predatory" competition in the retail field and this constituted an attempted to monopolize retail markets. More recent Section 2 cases afford more leeway for aggressive practices by powerful firms as legitimate responses to market oportunities. Other than *Zenith,* there are no well-known Section 2 cases directed at low-price imports.

We may draw several tentative conclusions from our limited experience with antitrust and international trade. Although American antitrust is famous for its ranging international applications, there has been very little use of the antitrust laws as a source of attack on unfair competition from low-price imports, notwithstanding the abundance of statutes reiterating that antitrust statutes are applicable to imports. *Zenith* and *Outboard Marine,* the principal import cases, reveal that American courts have been unreceptive to claims of predatory competition from low-price imports. Courts, commentators and the Department of Justice view the questions raised by low-price imports as complex matters of U.S. trade policy rather than grist for American antitrust law.[75] Hence, the curious equation in *Outboard Marine* of state subsidies with productive efficiency and the assertion that the market power of state-owned enterprises must be determined on the basis of market share alone, without reference to additional power derived from direct or indirect subsidies in a centrally planned economy. The Court in *Zenith* similarly was hostile to the numerous and intricate antitrust claims and, in the end, dismissed them all prior to trial.

To be sure, these are but two district court decisions and the cases presented novel issues for which there were no precedents. We nonetheless may generalize. Antitrust precedents, domestic and international, primarily deal with private enterprises and classic forms of anti-competitive conduct. They are not helpful on questions involving the legality and fairness of low-priced imports, especially imports from an SCE. The standard interences of intent from the acts of private enterprises cease to be reliable when the producer is a member of a state-controlled economy rather than a cartel. The standard methods for determining predatory pricing are not available where the producer is a part of a totally planned economy. Concern over monopolization or market domination is less when the potential sources of supply include producers in many foreign nations. Accordingly, courts confronting antitrust challenges to lwo-price imports are in an unchartered sea. The conventional tools of analysis do not illuminate.

Literature on antitrust and imports counsel against an active role for American courts in this area.[76] The position of the Department of Justice is summed up in its Guide to International Antitrust: "Competition by foreign producers is particularly important to the American consuming public where imports are or could be a major source of a particular product, or where the domestic industry is dominated by a single or a few firms." [77] Accordingly, the Department maintains a close watch on restraints on competitive imports from abroad and generally supports foreign producers in antitrust and administrative anti-dumping proceedings.[78]

Legal commentators also highlight dangers in applying antitrust to restrain imports. Such application may discourage desirable competition in American markets. Since there is little likelihood of foreign producer dominance in American markets, the classic sequence of predatory pricing—low prices followed by high ones after competitor elimination—is remote. Currently available low prices should not be discarded for the unlikely possibility of market dominance.[79]

More basically, commentators argue against antitrust application to imports on the ground that the issues are complex ones of trade policy; that courts are ill-equipped to resolve such issues; that U.S. trade laws address unfair import competition; and that antitrust needlessly adds to the complexity and expense of determining fairness.[80]

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[75] See the Department of Justice position set forth in Minchew, ed., Symposium at 47 (1978) and D.O.J. Guide for International Operations, discussed in Fugate, 17 Va. J. of International Law 645 (1977). It is D.O.J. policy to intervene in Treasury proceedings and before the I.T.C. to protect low-priced foreign imports against threatened sanctions. See Davidow (1980). See also Schwartz, Interface Two (forthcoming 1982); D. Rosenthal (1979) in id.

[76] Id.

[77] U.S. Department of Justice Antitrust Guide to International Operations (1977).

[78] See Davidow (1980); Michew, ed., Symposium at 47 (1978).

[79] Schwartz, L., Interface Two (forthcoming 1982); Minchew, ed., Symposium at 51 (1978); *cf., International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 722–25 (5th Cir. 1975) (judge reluctant to find that low prices today will injure consumers tomorrow).

In short, we are left with an anomaly. Congress in numerous statutes has affirmed the relationship between antitrust principles and the fairness of import competition. In theory, the antitrust constaints applicable to wholly domestic competition apply with equal force and in the same manner to import competition, and that includes the rules governing price discrimination. In practice the equal application idea disappears. The constraints have virtually no application to import competition. Closing that gap through judicial or legislative action does not appear promising.

IV. U.S. antidumping and antisubsidy laws reflect and implement market principles of fair competition

A. The Tokyo Round and U.S. trade laws

Given the moribund state of antitrust as a source of relief, U.S. trade laws are the virtually exclusive and critical source of protection against unfair trade and undue injury to American industries. There are four major protective programs: the escape clause providing relief where increased imports are a substantial cause of serious injury or threaten such injury to domestic industry; the market disruption provision providing relief where imports from a communist country are increasing rapidly so as to be a significant cause of material injury to a domestic industry; anti-dumping relief based on a finding that foreign merchandise is being sold in the U.S. at less than "fair value" and that a U.S. industry is materially injured or threatened with material injury; and the countervailing duty provision authorizing relief where a government or other entity is providing, directly or indirectly, export subsidies to merchandise sold in the U.S.; if the subsidizing country is a GATT signatory, material injury to a domestic industry is a condition of relief. Injury is otherwise irrelevant.[81]

The Tokyo Round of GATT multilateral trade negotiations, opening in 1973 and concluding in 1979, represented an ambitious effort by the international trading community to revise the rules governing non-tariff barriers such as anti-dumping and subsidy laws. Previous agreements focused on tariffs. The Tokyo agreements in turn provided the basis for the 1979 amendments to U.S. trade law. Among the significant developments in the Tokyo Round were the adoption of a subsidies code regulating countervailing duties and the subsequent addition in U.S. law of a material injury requirement for nations signing the subsidy code. Additionally, there were significant revisions in the GATT and U.S. anti-dumping laws.[82]

These reforms mirrow the intensified effort by the U.S. and its major trading partners to deal effectively with subsidized or below-cost export of goods. Hence, the Tokyo Round codes were hospitable to the use of anti-dumping and countervailing duty remedies, particularly with respect to the causation requirement. The new codes represent the views of major importing countries, such as the U.S., seeking protection against unfair practices. Besides accommodating more vigorous use of domestic unfair trade laws, the quid pro quo in the Tokyo Round for a material injury requirement in countervailing duty actions was a strengthened set of government obligations to refraim from the use of subsidies, particularly on non-primary or manufactured goods. GATT signatories accepted an unqualified obligation not to subsidize exports of manufactured products and further subjected internal subsidy policies to GATT legal actions.[83]

These fairness objectives commanded a high priority in U.S. policy. For example, the Congress in 1979 denied the benefits of its new countervailing duty law requiring injury to countries that did not sign the GATT subsidies code, even though such denial apparently is a breach of a U.S. obligation under the GATT MFN provisions.[84]

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[80] Id.; Schwartz, L., Interface Two (forthcoming 1982).

[81] 19 U.S.C. sections 160, 1673, 1671, 2251, 2436 (1976). Under Section 301 of the Trade Act of 1974, the President is authorized to take all appropriate action to obtain the elimination of any act or policy of a foreign government which is found to violate an international trade agreement or to be unjustifiable or unfair. The section has a private complaints procedure targeted at "foreign export subsidies." 19 U.S.C. section 2411. There also are special remedies for agricultural products. 7 U.S.C. sections 624 and 1854 (1976).

[82] See Hudec, Interface Two (forthcoming).

[83] See University of Michigan, Symposium (1979); Barcelo (1980); Cohen (1980); Hudec, Interface Two (forthcoming 1982).

[84] See Hudec, Interface Two, note 32 (forthcoming 1982).

The 1979 Trade Act implementing the Tokyo Round aims at more effective, certain and predictable enforcement of U.S. unfair trade remedies against both dumping and subsidies. The Congress insisted that the anti-dumping and countervailing duty laws be rewritten in great detail to assure prompt, rigorous and non-discretionary disposition of complaints. Likewise a judicial review procedure was added to guarantee that the law's criteria would be applied objectively and without diplomatic interference. Most specifically, the 1979 amendments altered prior law by adopting (1) a material injury standard for dumping and countervailing duty (c.d.) remedies, the latter being limited to code signatories; (2) definitions of the term "industry" and "like products" that facilitate a finding of material injury; (3) an expansive definition of the term "subsidy" in the c.d. statute; (4) numerous procedural changes to expedite and reduce the costs of anti-dumpting and c.d. proceedings; (5) measures providing for a more disciplined and adversary administrative process as well as for judicial review; and (6) provisions for settlements in limited circumstances.[85]

Pervasive in the legislative history of the amendments in Congress's dissatisfaction over the lack of effective and timely relief under anti-dumping and c.d. laws and over the operation of administrative discretion in the enforcement of these enactments. In an unusual proviso suggesting further legislative change, the Congress expressly observed that it was not approving the then-recent Treasury regulations setting forth administrative criteria for determining "fair value" for imports from a state-controlled economy.[86] These regulations were provoked by the controversial anti-dumping proceeding involving Polish golf carts, the administrative counterpart to the *Outboard Marine* lawsuit discussed earlier.[87]

B. Market principles of fair and unfair import competition

The 1979 legislation reaffirms that both the antidumping and c.d. laws rest on a widely shared and important principle: U.S. industries are entitled to relief against unfair import competition. A distinction between fair and unfair competition is central to the structure of U.S. trade laws. The significantly different standard of injury in the escape caluse provision and the c.d. and anti-dumping enactments well reveals that the nation will tolerate considerably greater harm from fair import competition than from unfair import competition. Unfair competition is dealt with in the anti-dumping and c.d. laws where the injury requirement is substantially less than the injury required for escape clause relief. Similarly, the President may veto escape clause and market disruption relief, while anti-dumping and c.d. relief is obligatory.

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[85] See Cohen (1980); Murphy (1980); Patenode (1980); University of Michigan, Symposium (1979).

The Trade Act of 1979 brought several aspects of U.S. antidumping law into accord with the international consensus represented by the 1967 and 1979 Codes. The long-standing demand for simultaneous consideration of both injury and dumping, particularly at the outset of an investigation, was largely met by adoption of a more meaningful preliminary scrutiny of the injury issue by the I.T.C., with a higher threshold of proof being required. Sections 101—"732(b)(2), 733(a)," 19 U.S.C. 1673a(b)(2), 1673b(a). Some authority to settle cases was granted. Section 101—"734," 19 U.S.C. 1673c. The Code definition of a "regional industry" was adopted. Section 101-"771(4)(C), 19 U.S.C. 1677(4)(C). And finally, duties levied in cases involving merely "threatened" injury (or retardation) were imposed only prospectively. Section 101—"736(b)(2)", 19 U.S.C. 1673e(b)(2).

A further concession to international opinion was the adoption of the words "materially injured," instead of just plain "injured," as the standard for the required injury determination. Section 101—"731," 19 U.S.C. 1673. In defining "material injury," however, both the House and Senate committee reports make it clear that they intended to change from the injury standard that had been applied by the I.T.C., under the earlier statutory term "injury," since 1975. H.R. Rep. No. 317, 96th Congress, 1st session, at 46 (1979); S. Rep. No. 249, 96th Congress, 1st session, at 87 (1979). For the statutory definition of material injury, see Section 101—"771(7)", 19 U.S.C. 1677(7).

Essentially identical limitations were adopted in the new countervailing duty law, where, as noted above, an injury requirement was being adopted for the first time.

[86] "The reenactment of the current statutory provisions on this subject is not an expression of congressional approval of the regulations promulgated by the Secretary of the Treasury on August 9, 1978." S. Rep. No. 96-249 at 96 (1979); H. Rep. No. 317 at 77 (1979).

[87] Section 205(c) of the Trade Act of 1974 provides that the foreign market value of SCE imports is to be determined by the price or constructed value of similar products sold or produced in a third or surrogate market economy country. In the Polish golf cart case, the Treasury initially found sales at less than fair value based upon the sales prices of a small Canadian producer. In the duty assessment stage, however, the Treasury decided that the Canadian manufacturer's output was no longer sufficient to reflect foreign market value. It announced an intent to use U.S. domestic prices as the determinant of foreign market value, which elicited strong free trade opposition. That led to the new regulations limiting use of third country prices to countries at a comparable stage of economic development and authorizing use of a constructed value standard where appropriate third country prices are not available. Using a construced value approach, the Treasury found that the Polish cart prices were not unfair. See U. Pa. L. Rev., Note (1978).

These enactments acknowledge a concept of fair competition that is implicit in a free market economy. An economy based on market principles has a set of postulates or shared understandings governing competition and other practices. These are the norms on which U.S. investors and producers rely in investing capital and expending energy. We ignore these understandings at the long-run cost of diminished confidence and belief in the operation of a free market economy. Demoralization is not a cost to be taken lightly.

The concept of fairness on which these laws are predicated is not what most free trade economists would deem to be unfair or harmful trade. Economists have long inveighed against any notion of dumping or subsidies beyond the classic form of predatory behavior aimed at establishing a monopoly through elimination of competition. That, they argue, can rarely, if ever, occur in international trade and in any case the antitrust laws provide adequate protection against predatory conduct. Absent a market take-over, economists ask why we should care if other nations give us their goods at prices below the home market price, whether through subsidies or otherwise.[88] The lower the price, the greater the benefits of trade.

U.S. trade laws leave no doubt, however, that we indeed care about non-predatory dumping or subsidies. We accept the rather substantial domestic harms from imports not merely because that afforst us more or cheaper goods—consumer surplus—but because shared free market values support or compel our acceptance of fairly priced competitive imports. These values dictate that if foreign producers are truly more efficient than American producers, they should have access to U.S. markets. If they can do the job better, they deserve the business of American consumers. That is the heart of the commonly understood case for free trade and against protectionism. It is an argument based on free market values, not economics.

But the principle contains a limitation: competition is not fair if a foreign exporter could not stay in business were he to receive the U.S. price on all his goods. If the U.S. price does not cover fully distributed costs of production, then competition at that price is unfair. The foreign producer is not as efficient as his U.S. prices would indicate. The producer can do the job better only because of an internal or external subsidy allowing the low U.S. price. Subsidies, whether derived from market power in home or other markets or from the state, are not to be equated with superior performance.[89] Where import competition is not fair, harms to American producers and workers are unwarranted.

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[88] See Abrams (1981); Ehrenhaft (1979); Lowenfeld (1980); Slayton (1979).

[89] Support for this argument may be found in Lowenfeld at 209–11 (1980); Interface One at 1-20, 245–57 (1980); Hudec, Interface Two (forthcoming 1982). Professor John Jackson of Michigan expresses the point in the following excerpt from his paper presented to the Interface One proceedings:

> An economy based on market principles has a set of "rules of the game" (*e.g.*, sound and fair competitive behavior) which are not followed in a nonmarket economy. Likewise, government-owned enterprises may operate under rules (*e.g.*, direct government subventions to encourage maintenance of unprofitable plants in areas of high unemployment) which differ from those acknowledged in a purer market economy. . . .
>
> Country A is a nation whose economic system would generally be described as "market oriented" or "free enterprise." Country B is a state-trading, socialist economy. When Country B produces and exports goods to Country A, where those goods compete with the products of domestic enterprises in Country A, a number of worries traditionally have arisen in Country A. Because production and export in Country B are controlled by the government, some worry that government B may pursue noneconomic goals, in its export and production policy. For example, it is worried that Country B will try to make Country A economically dependent on Country B's exports. It is also worried that Country B may promote exports of a particular commodity for political reasons, not based upon economic considerations of efficiency and comparative advantage.
>
> Other worries stem from the fact that prices in Country B are artificial, so that whatever price is set for export sales in Country A can, by political fiat in B, be such that they will undercut the competition of the domestic industry in Country A. Whether these worries are fully supported by the facts has been questioned. Some have argued that there is no reason why an enterprise in a socialist economy would want to sell goods at a loss any more than an enterprise in a nonsocialist economy. However, because the accounting system in the socialist economy is different, the prices of goods may not reflect the "real market" type prices which would pertain in a "free-enterprise economy." Workers' wages, for example, may be artificially low, partly because workers are supplied with low-rent housing and certain other benefits that are not accounted for in the pricing of an enterprise's goods.
>
> The hypothetical case is a prototype situation which causes worry about the trade relations

Continued

The principle is unmistakably expressed in a 1974 amendment to the anti-dumping statute directing that home market prices may not be considered as evidence of "fair value" if sales in the home market at these prices do not permit the full recovery of production costs within a reasonable period. The amendment affirms that even non-discriminatory import prices are unfair if they do not fully cover costs; sales at such prices do not manifest superior performance.

The same value judgment is seen in the c.d. statute. A subsidy of any kind, from any source, enables a foreign producer to sell in the U.S. at prices that are lower than those necessary to stay in business. The relationship between fair competition and prices above costs is also reflected in domestic legislation, most notably the Robinson-Patman Act and the Sherman Act.

Literature on public choice theory also acknowledges that adherence to this principle is indispensable to marshalling widespread support for, or acceptance of, freer trade policies. More bluntly put, anti-dumping and c.d. laws are the political price that must be paid if a democratic polity is to have free trade policies.[90]

We should observe that this concept of fairness is not congruent with the economic principle of comparative advantage underlying trade. As we have seen, comparative advantage does not require absolute efficiency in the production of a traded good. Indeed, comparative advantage predicts that trade will occur even where domestic firms are the more efficient producers.

The principle of fair competition—prices above costs—is more restrictive on trade than the economic principle of comparative advantage. That, no doubt, is why free trade economists deride the idea. But the principle affirms that a free market rests on ethical postulates that are not derived exclusively from an economic vision of optimal production.

C. The fairness of competition of imports from a nonmarket economy

1. Dumping and SCE imports.—This principle of fair competition is what U.S. anti-dumping and c.d. laws reflect and seek to implement, however imperfectly. These laws govern competition from all nations; SCE's are not privileged exceptions. To the contrary, Congress has recognized in Section 201, the market disruption provision, a special potential for harm from SCE or communist imports and perhaps for unfairness as well. Further, the non-discretionary nature of anti-dumping and c.d. remedies demonstrate that fairness guarantees are not subject to changing foreign policy considerations.

The problem, however, is in applying these principles to trade from as SCE. The information available from an SCE, even upon full disclosure, does not provide any reliable basis for concluding that imports are fairly priced above producer costs. Commentators observe that a market relationship between price and production costs cannot be established for goods produced in a state-controlled economy, because, inter alia, the currency is not convertible, input and product prices are administratively determined, and home and export prices do not mirror costs.[91]

Virtually all commentators agree that the cost-price information barriers are insurmountable. We cannot use or compare the home market price in an SCE to calculate "fair value" and we cannot use the home market price of inputs to calculate production costs. Even staunch free trade advocates concede that the costs and prices found in non-market economies do not correspond to the cost-price concepts used in anti-dumping laws, and that we have yet to discover a way of accurately determining market costs and prices for such goods. Economists also observe that various surrogate measures of costs and prices are expedient and artificial approximations, lacking in economic validity.[92]

Some commentators recommend that the policies of trade law would be better served if cost-price concepts were entirely eliminated when dealing with goods from non-market economies, so that restrictions on trade would be considered solely in terms of whatever "injury" SCE imports cause to domestic producers. Other free

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between a socialist and a market economy. How can the market economy promote and encourage that trade which gives its consumers the benefit of comparative advantage, while preventing that trade which would tend to undermine its own free enterprise system by pricing its goods when they are sold in the market economy, at such level which would tend to drive out the "fair and efficient" domestic producers who have relied on the rules of the market economic system?

[90] See Hudec, Interface Two (forthcoming 1982); Interface One at 1-5, 29 (1980); S. Rep. No. 1298, 93d Congress, 2d Session 180 (1974); Amacher, at 2345-39 (1979).

[91] Fensterwald (1959); Gryzbowski (1980); Parsons (1972); Potter (1981); Wilczynski (1964); Hudec, Interface Two (forthcoming 1982); Pisar, S., 180-88 (1970).

[92] Interface One at 151-93, 245-63 (1980); Hudec, Interface Two (forthcoming 1982); Lowenfeld (1980).

trade advocates prefer surrogate cost-price measures because, although cumbersome and artificial, they produce a politically acceptable cost justification for most low-price SCE imports and thus impose fewer trade restrictions in the long run than an injury test.[93] The U.S. Treasury Department, and presumably its successor at the Commerce Department, and the Government Accounting Office as well, also support continuation of surrogate measures to determine the "fair value" of imports from SCE's. A former Treasury official once responsible for dumping determinations, Andreas Lowenfeld, advocates an objective injury standard in lieu of the will of the wisp distinction between fair and unfair competition.[94]

Senator Heinz's bill also continues the tradition of surrogate measures. It reduces administrative discretion, however, by relying on the lowest free market producer price as the measure of fair value for imports from an SCE. This inquiry is less cumbersome than the present practice, reflected in regulations, of employing a constructed value standard to determine fair value.[95]

Under the latter inquiry, the inputs actually used in producing an imported product in an SCE, assuming that information can be ascertained, are then "priced" in a "comparable" free market economy. Comparability is based on per capita income and other factors. Selecting the comparable market economy country and verifying the inputs in the SCE are among the difficulties in this constructed value approach. More basically, one may seriously question the administrability, predictability and accuracy of any system which relies on input cost comparisons of surrogate producers.[96]

The technical intricacy of this determination does not produce commensurate gains in reliability or accuracy. As a practical matter, the concept of costs in dumping proceedings has become a matter of rather arbitrary assumptions coupled with the use of crude and arbitrary accounting devices. Consequently, laws and regulations requiring deeper and more accurate analysis of "true costs" are probing into a bottomless pit, asking for things that ultimately cannot be found. But there is a risk that such inquiries will paralyze the administration of fair trade laws; there may just be too much to be done with the time and resources at hand. In a few recent episodes, administration has come perilously close to that condition. Import issues in the giant industries—e.g., steel, textiles, auto—have not been resolved in anti-dumping proceedings, albeit not for lack of persistent trying.[97] To avoid indeterminate proceedings, administrators will be forced to consider changes, such as an inclination to settle cases and an increased willingness to develop rules of thumb for resolving the issues.

Free trade advocates who see anti-dumping laws as protectionist obstacles to more trade favor obscure technical complexity because they rely on administrative discretion to forestall relief. The administrative record to date in respect to goods from SCE's supports their assumption. For example, Treasury quickly backed off its dumping finding in respect to Polish golf carts through use of a surrogate cost analysis. The congressional response to the Treasury Regulations governing imports from SCE's and the Heinz proposals are signs that Congress has recognized the discretion-complexity problem in dumping proceedings.

Sweeping reform assuring more effective enforcement of anti-dumping laws would provide a larger role for settlements in the form of voluntary elimination of dumping margins and price or quantity assurances from foreign producers. Another reaction to complexity could be the development of simplified, easily applicable legal criteria that would deal more efficiently with allegations of dumping or subsidies. Simpler and less discriminating tools would not produce much of a loss in precision, since the latter is an illusion under present standards. One no doubt controversial form of simplification entails reliance on "minimum price" remedies. The U.S. trigger price mechanism for steel imports contains the seeds of this approach in calculating a single price that would identify injurious dumping for all suppliers. Further, the imposition of a mandatory, across-the-board minimum price requirement as a remedy for unfair trade is not without precedent.

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[93] Id.

[94] Lowenfeld (1980); Comptroller General (1981); 19 C.F.R. section 353.

[95] S. 958, 97th Congress, 2d session (1982).

[96] The ultimate economic validity of the 1978 Treasury formula has been repeatedly attacked. U. Pa. L. Rev., Note, at 238–42 (1979)/ Interface One at 245–57 (1980).

[97] Most cases brought under the fair trade laws entail specialty products and relatively small U.S. industries. The detailed micro approach tends to break down in the exceptional "large" case. Relief under these laws is rarely, if ever, provided in the big cases. Moreover, enforcement of an anti-dumping tariff or other remedy in these cases is extremely problematic. See Ehrenhaft (1979); Hudec, Interface Two (forthcoming 1982).

The "variable levy" of the E.E.C. Common Agricultural Policy rests on such a notion. The key element in the variable levy is a "world reference price" for the agricultural product in question. This world reference price is artificially constructed with the aim of representing the price at which goods would be exchanged under normal competitive market conditions. The justification for constructing the reference price is basically an unfair trade rationale: the price structure for agricultural products has become totally unrelated to market forces due to widespread export subsidies and other forms of government intervention. Therefore, import prices below the reference price are abnormal and should be taxed with a supplemental duty equal to the underpricing in the same manner as an anti-dumping duty.[98] Implicit in this remedy is the suggestive idea that a single world price calculation is justified when the underlying market has become so distorted by government intervention that case-by-case analysis has become impossible or unfeasible.

Conceivably the U.S. could employ a similar remedy for cases in which the practices of dumping and/or subsidies are perceived to be widespread and case-by-case analysis into cost or fair price is not feasible. Similarly the remedy would be appropriate for U.S. imports that are substantially produced in centrally planned economies, since the cost-price inquiry is always cumbersome and unreliable in there circumstances. Upon a finding of injury or threatened injury from such imports, the Commerce Department would conduct an investigation to determine a "fair" world price for the product, an investigation that would involve less expense, time and detail than ordinary unfair trade proceedings. Relief would be in the form of supplemental duties or mandatory prices.

A minimum price approach would obviously effect a fundamental change in U.S. unfair trade law and would provoke powerful opposition from free trade ideologues. Nevertheless, it may be a necessary response to demands for more meticulous cost justification in a world where "cost" has become an increasingly immeasurable abstraction. It also is responsive to the widespread belief on the part of American business and lawmakers that imports from countries with heavy or total government involvement in the national economy have been subsidized or dumped. On the level of political choice, the greater the validity and effectiveness of remedies against potentially unfair import competition, the greater the government's ability to refuse intervention to rescue producers injured by trade—the genuinely non-competitive firms. The government obtains business support for a liberal trade policy in exchange for a strict, objective and nondiscretionary remedy against unfair trade practices.[99] To be sure, some observers of trade policy may question whether the minimum price concession will not itself defeat the objective of a liberal trade policy.

2. Subsidies and SCE imports.—Curiously, imports from state-controlled economies have not provoked inquirey into the use of government export subsidies under the U.S. countervailing duty (c.d.) law. U.S. trade laws have treated imports from non-market economies exclusively as a problem of dumping rather than subsidies. In the normal market economy setting, dumping laws are usually applied to price-setting actions of the producer (ordinarily a private firm), whereas subsidy laws are applied when the case involves actions of the state transferring a benefit to producers. The definition of subsidy in the U.S. contervailing duty law is comprehensive and plainly would cover the benefits conferred by the state to productive units in an SCE. Hence, imports from non-market economies are subject to challenge on the ground of state subsidies as well as dumping. In an SCE there is virtually no correspondence between the home market and export price of a good, which suggests the possibility of an export subsidy. Moreover, the state acts as both producer and treasury, so that when losses occur, it is just a matter of bookkeeping.

In recent years, Congress, probably inadvertenly, has treated imports from SCE's as a problem of dumping and not subsidies. In both the 1974 and 1979 trade legislation, state-controlled economy trade is referred to under the dumping laws and nothing at all is said about this subject in the law pertaining to subsidies.[100] There may be a technical explanation for the dumping assumption. In the ordinary case, the countervailing duty law for subsidies contemplates identification and measurement of a resource transfer from the state to the producer and this is not a measurable event in the typical non-market economy. The anti-dumping law in contrast concentrates on a concept of "fair value" and operates in terms of data on price and producer costs. Surrogate calculations and guesses about "fair value" fit more easily into the looser dumping legal framework

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[98] See Dam at 256–60 (1967).

[99] Hudec, Interface Two (forthcoming 1982); Jackson, Interface One (1980); Ehrenhaft (1979).

[100] Trade Act of 1974, section 321(d), 88 Stat. 2047 (1975); Trade Agreements Act of 1979, section 101, 19 U.S.C. section 1677(c). Administrators may have steered cases toward the antidumping statute and away from the countervailing provision.

But given the intensified interest in "subsidy" problems during and after the Tokyo Round, there is the option of treating non-market trade as a subsidy problem; there are signs of interest in this alternative. There is at least one legal consequence to treating SCE imports as a subsidy rather than dumping issue. Since the U.S. countervailing duty law does not contain a "material injury" test for governments who are not signatories of the GATT subsidies code, the injury test would not apply to subsidized imports from SCE's. Another advantage of the U.S. countervailing duty law is in the area of settlements; the countervailing duty law permits settlements of complaints that guarantee removal of injurious effects in which the subsidizing government undertakes to limit the quantity of exports whereas the anti-dumping settlement provision bestows no authority for quantitative settlements.

Draft regulations proposed several years ago by the Treasury Department subjected non-market trade to the countervailing duty law as well as the dumping law. The proposed regulation was withdrawn, without an indication of whether it would be reissued.[101] Moreover, Article 15 of the GATT Subsidies Code contains an explicit provision authorizing governments to deal with non-market economy trade under either anti-dumping or countervailing duty laws. That article authorizes governments to establish the existence of a "subsidy" for SCE exports by applying the same surrogate price calculations used to establish dumping—the difference between the surrogate fair value price and the actual export price.[102] Although the Subsidies Code is not legal authority to impose countervailing duties under U.S. law, it is an aid to interpreting the U.S. law if that law is regarded as unclear. The GATT provisions, moreover, obligate governments to notify, limit, or refrain from using subsidies for exports.

Finally, one may plausibly view all SCE export prices as akin to export subsidies. Since export pricing decisions in non-market economies are made independently of domestic price levels, they are separate from domestic prices. They can be corrected without affecting whatever domestic policy, if any, dictates the domestic price. Thus, the arguments used to justify insulating domestic subsidies form international trade discipline do not apply to the export prices of SCE's.

Dealing with SCE exports as a subsidey issue does not resolve the problem of a workable standard for measuring the subsidy. But experience with this issue in anti-dumping proceedings and the need for a standard that makes a lawful price predictable suggests relying on "prevailing market price" as the measure of a subsidy. It is plainly feasible to subject SCE export prices to a standard of prevailing market prices without interfering with internal domestic policy.

One final observation on the application of the c.d. law to imports from SCE's. Trade literature suggests that the Treasury Department for many years had been particularly remiss in the enforcement of the countervailing duty statute. Administrative inaction was a characteristic feature of countervailing duty enforcement proceedings.[103] Congress critically observed this administrative nonfeasance in mandating time limits and expedition for countervailing duty cases. There is little available information on Commerce Department implementation of the 1978 legislation.

3. Market disruption and SCE imports—Section 406 of the Trade Act of 1974 created a special import relief provision applicable solely to non-market economy trade. The legal criteria defining section 406 relief represent something of a compromise between the escape clause criteria (fair trade) and the criteria of the c.d.-dumping laws (unfair trade). Market disruption is defined as "material injury," a standard of injury lower than the standard for ordinary escape clause relief, but comparable to the anti-.dumping standard. Section 406, however, was not designed as a substitute for anti-dumping actions, since it is limited to certain kinds of import injuries. As interpreted by the Treasury Department, section 406 is intended only as a special safeguard against a sudden and massive flood of imports, the sort of floods that non-market economies were believed capable of creating. The injury test for section 406 relief has proven to be elusive and uncertain. In particular, the rapid flooding condition has severely restricted findings of injury. Section 406, however, resembles an adjustment measure, similar to the escape clause, in its provision for temporary relief and a presidential veto. The veto has prevented relief in the few cases where market disruption has been found, *e.g.*, clothespins from the PRC. Diplomacy and foreign relations have influenced administration of section 406.

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[101] "Countervailing Duties," 45 Fed. Reg. 4932 (Jan. 22, 1980). The notice withdrew other proposed regulations as well.

[102] Article 15 relates only to the application of national unfair trade laws. The Code is silent on the meaning of "subsidy" in regard to the obligations of governments not to use subsidies under part II.

[103] Applebaum at 211 (1979); Symposium on the Multilateral Trade Agreements, 11 Law & Policy in International Business 1497–1526 (1979); Interface One at 288–316 (1980); (Summary of Investigations); Exec. Office of the President (1980); President, Annual Reports (1978 & 1979); Ehrenhaft (1979).

These sources indicate that anti-dumping complaints have increased rapidly since 1970; that until recently the countervailing duty provision was not a source of relief in any significant number of cases; that of the 17 anti-dumping complaints against SCE imports from 1955 to 1978, about seven were successful in administrative proceedings. There were no countervailing duty proceedings involving an SCE.

Limited sectors of the economy account for the bulk of anti-dumping proceedings; from 1975 to 1959, five industry groups were involved in 86 of the 133 anti-dumping cases, and four groups were involved in 79 of the 108 countervailing duty cases. Most of the large cases were dealt with outside of the countervailing duty-dumping laws, *e.g.*, steel and textiles. Enforcement problems appear in the one big case in which there was dumping relief against Japanese color television sets.

The growing interest in unfair trade legislation has led to proposals for clarification of a "fairness" dimension to section 406. After redefining dumping by a non-market economy as sales below the lowest price offered by a market economy supplier, the Heinz-Cotter bill added to section 406 a second category of "market disruption," called "market disruption by artificial pricing." The concept of artificial pricing is identical to the new difinition of dumping in the bill. Noting that this second type of disruption is clearly "unfair" trade, Heinz-Cotter proposed that the presidential veto and the time limit on remedies be eliminated when such trade is at issue.[104]

V. SCE imports pose special dangers of below-cost pricing and long-run availability

This proposal is yet another sign that the fairness issue remains central to the treatment of non-market economy trade. It may not yet be the focal point of the pressures for more effictive anti-subsidy and anti-dumping barriers, since imports from SCE's are modest in comparison with imports from market economies, such as Japan and Taiwan. Moreover SCE imports either have not generally threatened large and powerful U.S. industries, or have been subjected to special protective measures for such industries. In short, Congress to date has not seriously viewed SCE imports as a source of major injuries to American industries, although the MFN agreement with China has stimulated concern and an eventual MFN agreement with the Soviet Union will heighten that concern.

Most importantly, there apparently is not widespread recognition in Congress that U.S. countervailing duty and anti-dumping laws are unworkable in their application to state-controlled economies. While that point is established in trade literature, it has not provoked efforts to create more effective controls on SCE imports. The most one finds is dissatisfaction with the 1978 Treasury-constructed value regulation and modest reform proposals, the Heinz bill, for instance.

A notion that imports from non-market economies should not be treated in a more restrictive manner than market country products seems more influential in policymaking circles than the alternative understanding: that the market approach to SCE imports, even with adjustments, provides illusory protection against unfair prices and that American producers competing with SCE imports do not enjoy the level of protection afforded other domestic industries that compete with market country imports. Persuasive evidence that SCE imports are unfairly priced would provoke more substantial reform.

But the extent to which SCE imports are priced below a market cost of production or home market prices is simply not known and ultimately may not be knowable. Free trade advocates theorize that the danger is not substantial by invoking a common sense perception that central planners have every reason to select for export those products which earn the most for the least social expenditure of resources. Exports are worthwhile for an SCE, they argue, only when the opportunity costs of producing such goods is lower than the opportunity costs of producing the imports purchased with hard currency earnings from exports.[105]

These advocates pounce on the oft-repeated statement that non-market economies export at a loss because they have a dire need for hard currency in order to purchase foreign goods. They correctly point out that market economy trade is similarly motivated, since a need for foreign curency is but only a need for the things that foreign currencies will buy. Demand for a foreign product exists in a market or non-market economy whenever the cost of the foreign product is less than the cost of producing it domestically. All trading countries have a need for foreign or hard currency, *i.e.*, foreign-made goods.[106]

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[104] S. 1966, 96th Congress, 1st session (1979); H.R. 5773, 96th Congress, 1st session (1979).

[105] Interface One, Professor Holzman, at 90–91 (1980); Hudec, Interface Two (forthcoming 1982).

But there is something left to the argument nonetheless. Demand for foreign goods in an SCE is government rather than consumer demand. Government demand for certain "vital" foreign goods, such as heavy capital equipment and technology necessary for industrial modernization and infrastructure projects, may be far more intense and price inelastic than consumer demand. To take a dramatic example, observe the prices Argentina was willing to pay for certain strategic goods during the Falkland conflict. Assignment of a sufficiently high priority to certain goods in a nation's economic plan can lead to underpricing exports in order to obtain foreign-made goods. To be sure, that cannot go on forever, but foreign credit and other devices can sustain the practice for substantial periods.

Hence, the hard currency need does pose the possibility of underpricing. There are other indicators as well. Based on a welfare economic approach to central planning, some argue that planners would find it sensible or necessary, at times, to sell below cost. Since the state must assume welfare costs for unemployed workers, it is rational to treat wages as a fixed cost of production and disregard them entirely in calculating the profitability of export prices. These costs will be incurred with or without exports. It also is sensible for SCE planners to discount wages and indeed capital inputs in pricing exports because of the social instability caused by widespread unemployment in a non-market economy. If central planners are concerned with unemployment, they will adopt policies to put these people to work. Cheap exports is one of those policies. Market economies can do this too, but only through visible subsidies to private producers of other equally detectable programs.[107] What governments do in non-market economies is not ascertainable.

All of these points can be found in the literature on the People's Republic of China and its present economic trade policies. That literature also points out another theme of relevance here.[108] The PRC has been notoriously unstable in its economic planning policies, and its foreign relations as well. Even within the last five years it has considerably changed its planned import-export mix of products. As we have seen in the discussion of dislocation costs, instability in a country's flow of exports is enormously costly to the importing country that has adapted its employment and productive patterns to these imports. Alternatively put, short-run cheap imports, whether priced below or above costs, are economically costly to the importing nation even on the most favorable view of free trade. The pure economic case against predatory pricing is based on the inherently limited duration of such prices and the domestic impacts of such prices. The history of the P.R.C. and of its trade and foreign relations with the U.S. does not warrant confidence in the long run availability of low-priced imports from that country. Moreover, the twists and turns of U.S. foreign policy as well render future economic benefits from trade with particular communist nations exceedingly uncertain.

In sum, we can only speculate, with doubts, on the longer term benefits of trade with the P.R.C. But present day short-run costs are not speculative. Dislocation, idle machinery, capital losses, unemployment are the early effects of import prices designed to penetrate the American market.

Several features of the typical trade arrangement between state controlled economies and U.S. companies—counter-trade agreements—demonstrate both the dangers of underpricing and short-run availability. Counter-trade, a modern instance of barter, is the practice by which a non-market economy purchases manufactured goods, plants and equipment from western producers and agrees to pay for these goods through counter-trade deals—compensation or counter-purchase agreements. Under compensation agreements, the western trading partner supplies technology and equipment and receives as payment, over the terms of a bilateral contract, a predetermined volume of the plant's output in the SCE. Counter-purchase, in contrast, is a transaction in which western goods are paid for with a particular SCE-produced commodity to be supplied for a specified period. The controversial agreement between Occidental Petroleum and the Soviet Union, which was the subject of two International Trade Commission investigations, had elements of both compensation and counter-purchase.[109]

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[106] Hudec, note 90, Interface Two (forthcoming 1982).

[107] Interface One at 251–52 (1980); Potter (1981);Vernon (1979).

[108] Cahill (1973); Whitson (1974); Albinski (1973); George (1981); Jenkins (1980); Lebedoff (1980); Lew (1981); Potter (1981); Vernon (1979).

[109] For an account of the *Occidental Petroleum* proceedings, see Potter (1981).

The case against these agreements essentially is that the SCE price is likely to be set at the level necessary to penetrate the western market. SCE choice of export goods and prices are not based on assessments of supply and demand conditions in the free market economy.[110] Since supply and demand factors are ignored, the price necessary to penetrate must be below the prices of domestic producers and that price will be established without regard to production costs in the non-market economy. It, therefore, must cause competitive harm in the importing country. But supply at that price will be for the specified period of the counter-trade agreement and not beyond. That is long enough to injure domestic industry without assuring consumers of long-run availability. Direct documentation of below-cost pricing in counter-trade agreements is, of course, not available, since it is not possible to know. Indeed, it is unlikely that planners in non-market economies have this information. Literature on home prices in SCE's, especially the Soviet Union, points out that domestic prices have no relationship to any economic reality pertinent to a market understanding of cost and prices.[111] Some theorists question what is so valuable about a market understanding of prices, but this point is not responsive to the fairness objective of trade protections.

There is finally the question of further research and studies. Economists have begun to pay more attention to transition states and dislocation costs that follow changes in national commercial trade policy. The empirical work in this field is still relatively limited. Studies on labor impacts, for example, rest on assumptions that tend to conservatively state losses in employment from imports. The methodology is complex and the investigator has a fair amount of choice regarding working premises and assumptions. For example, the equation of import and export contraction apparently does not rest on compelling theory or empirical data.

Further information on the nature of economic planning and pricing in an SCE or communist state might well support arguments similar to the one directed at counter-trade agreements. Experience confirming the short-run duration of cheap imports from the PRC or other communist nation would provide powerful arguments against the economic benefits of such trade. Similarly, more careful scrutiny of the administration of U.S. fair trade laws might well support further legislative reform. Perhaps because of the esoteric and non-litigative nature of the subject matter, these laws and their implementation are rarely explored in legal periodicals. Although apparently there has been dissatisfaction in Congress over implementation, even that has been based on little hard information or analysis.

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[110] Potter (1981); Vernon (1979).

[111] Hudec, Interface Two (forthcoming 1982); Interface One, 245–58; 278–87 (1980).

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Mr. **HEEBNER**. Thank you.

The American hotel and restaurant china industry is a small industry employing about 5,000 people throughout the United States. The industry is not characterized by high wages or excessive management compensation. Our average factory employment cost is about $10 per hour in total as compared with the $20 to $23 an hour total employment cost in many larger industries.

The management compensations are similarly modest. The American market for restaurant china has been characterized by very strong price competition among the domestic manufacturers, and this has assured the consumer of a fair price. This competition has been further magnified by competition from many other tabletop substitutes for china.

The industry has never lacked the capacity to give good service to the industry except during the few occasions when the American economy has been overheated, as it was in 1975 and 1976. And in the last decade our industry has made significant capital investments to make our factories as modern and as efficient as any in the world today.

Specifically, in my company we have been using computerized controls on major installations and equipment for several years. Engineering and the installations are currently well underway to utilize the latest in all of the mechanical technologies. The information available to me indicates that my company has greater labor efficiency by at least a factor of four when compared with the Chinese factories we are competing against in the American market.

Now, despite this tremendous difference in efficiency, we have little defense against the Chinese Communist Government that has targeted our market and is now buying market share without regard to what we call cost investment or profit.

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[2] References to congressional reports and U.S. statutes are not included in this bibliography.

Imports from the People's Republic of China [PRC] have increased at an explosive rate since they were given most favored nation status [MFN] in February 1980. In 1979 they exported 33,000 dozens to the United States, and in the 10 months after they received MFN, they exported 520,000 dozens; in 1981 it was 708,000 dozens; and in 1982 it was in excess of 900,000 dozens.

All of the goods from the PRC are mere copies of the high volume patterns made by the American producers without any technical improvements, without changes or innovation in the designs. The prices do not establish that the PRC is more efficient in making restaurant china, but they do reflect a government subsidy which cannot be equated, in my opinion, with comparative advantage.

In effect, independent American companies are being required to compete against a Chinese Government whose policy is to displace and thus injure American producers. To me these are predatory pricing practices which would be considered illegal under our antitrust laws. Yet this similar practice is being employed by a Communist nation, and our concept of free trade does permit it.

The present trade remedy laws do not seem to work for small competitive industries such as ours primarily because of the extreme legal costs, the complex problem of obtaining usable data, and the overriding political decisions governing relations with specific foreign nations.

For example, a section 406 disruption case might seem to offer appropriate relief to our industry. Yet to your knowledge there has never been a successful case against the People's Republic of China, and the prospect of presidential veto has deterred us and other industries from pursuing meritorious but very expensive cases.

In our view, one way to improve the market disruption remedies would be to remove the presidential discretion, because the mere existence of the discretion means that an exporting country could be offended if the discretion were exercised against them. And it would seem to me that the risk of that offense seems to be an assurance that the remedy would not be used.

The fundamental question is whether the PRC and other nonmarket economies are going to enjoy a privileged exemption from what we have deemed to be fair competition mandates of U.S. trade laws and be allowed to operate outside of our antitrust laws and philosophies.

One approach to this problem, which is certainly controversial but we believe will improve the existing trade remedy laws, is to apply a restrictive quota to all imports from Communist and other nonmarket nations so they cannot overwhelm an American industry by their government's decision to target a market.

Increases in such quotas could become the subject of negotiation and give time for domestic industry to be heard and to act in their own defense. This system would imply that a Communist nation would be required to apply for entry, so to speak, into the American market rather than have the opportunity to come in and overwhelm it. And I realize this is controversial.

The antidumping and countervailing duty remedies do not provide a realistic assistance for industries of our size, in my opinion, because, first, these investigations are very expensive and only large companies and large trade associations can afford them.

The American Restaurant China Council found that it would cost us in excess of $150,000 just for us to determine if we had a viable case.

Second, the characteristics of a State-controlled economy prevent meaningful or reliable determinations of cost or fair value, and other people today have explained that far more competently than I can.

Third, even if we could determine that the prices from Communist China did cover their production costs, the enormous differences in the standards of living of that nation and ours creates a genuninely philosophical problem.

For decades there has been a sustained effort in the United States to enact laws to enhance the standard of living of the American industrial worker as well as all other citizens. We have succeeded and how have one of the highest standards of living in the world. I think we must find an equitable way to trade with State-controlled economies and still not destroy the standard of living in this Nation.

We have two suggestions for approaching this problem. First, consider using the Federal minimum wage rate as a basis for determination of labor costs, and thus the minimum selling price for a nonmarket imported good into the United States. This would circumvent the problem of finding surrogate nations and making unrealistic cost estimates. Although contrary to free trade postulates, the proposal is one way of reconciling the real and immensely difficult conflict between our social legislation to maintain living standards and that of international trade.

This concept would allow efficient American manufacturers to compete and to provide jobs. It would not assist industries with high employment costs or inefficient facilities, but to allow the foreign low wage to prevail is to export even our efficient manufacturing employment to the country with the low standard of living.

Instead of protecting the American worker with the dignity of a job, we will have exported his job and left him unemployed and perhaps dependent on welfare.

Our second alternative to the same problem is to create some form of minimum price remedy, and I suggest that the use of the average export price from a representative group of free market countries would greatly simplify the process as well as preserve some equity for the standard of living in the United States. This price would be intended to be the price at which goods would be exchanged under normal free market conditions. It avoids the will o' the wisp search for the true cost of production in a nonmarket economy.

From our standpoint there is one final improvement in the laws which would be meaningful, and that is to require that all foreign china products be indelibly marked with their country of origin. This would eliminate the use of adhesive stickers which are lost during washing, and thereby permit the palming off copies of American china by both importers and American manufacturers who have facilities abroad.

This is not a difficult problem to solve. It is rare that a china manufacturer does not indelibly mark the china with his name, and adding the country of origin does not create an additional cost.

Just one other thought, and I just wish to point out that most of the skills in our industry have a low level of transferability, and further, our industries, our plants are located in areas already high in unemployment, so the prospects of displaced people for new employment is rather dim.

I wish to thank you for the opportunity for being heard on this complex and critical problem, because I think that the future of American manufacturing industries certainly does deserve this amount of attention.

[The prepared statement follows:]

STATEMENT OF JOHN C. HEEBNER, PRESIDENT, BUFFALO CHINA, INC, AND VICE PRESIDENT, AMERICAN RESTAURANT CHINA COUNCIL

SUMMARY

1. The American hotel and restaurant china industry employs about 5,000 people located in already economically distressed areas such as Buffalo, New York, East Liverpool, Ohio, and New Castle, Pennsylvania. The industry has total employment costs of about $10.00 per hour as compared with $20.00 to $23.00 per hour in larger industries.

2. The industry is threatened with a major loss of market to imported goods from low-wage and non-market countries and in particular the imports from the People's Republic of China. (P.R.C.)

3. Significant capital investments made during the last decade have made the manufacturing plants as efficient as any in the world today. In spite of greater efficiency, the American manufacturers are being under priced by 30 percent in the American maket by the P.R.C. The Chinese do not have a comparative advantage because of efficiency, but instead they have a low standard of living and a Communist government that has targeted the American market and is arbitrarily setting the export price level to displace domestic manufacturers.

4. P.R.C. imports increased from 33,000 dozens to more than 700,000 dozens in less than two years after they received M.F.N. status. Unemployment in our industry is now about 35 percent and capacity utilization about 55 percent.

5. The present trade remedy laws do not seem to work for a small competitive industry such as ours because of the extreme legal costs in pursuing remedies, problems in obtaining data, and overriding political decisions.

6. The imports from the P.R.C. represent the fundamental problems facing American industry when it is required to compete in the American marketplace against low-wage and non-market imports. The issue is increasingly severe among small American companies who employ the largest part of our work force. The problem stems from their low standard of living, the arbitrary establishment of prices by their governments, and their governments decisions to target American industries.

7. Unless we develop protective solutions to the trade philosophies being used by foreign governments, we will transfer all American manufacturing employment to the foreign low-wage countries.

8. There are several options for improving the trade remedy laws which we believe should be considered:

a. Apply a restrictive quota to all imports from Communist and other non-market nations so they cannot overwhelm American industry by their government's decision to target our markets. Increases in such quotas could be nogotiable and involve American industry.

b. Use the federal minimum wage rate as a basis for the determination of labor costs and thus the minimum selling price for non-market and low-wage country imported goods.

c. To simplify the complex and expensive proceedings surrounding anti-dumping and countervailing duty cases, we suggest the use of the average export from a group of free market countries.

d. To prevent the loss of country of origin identification, all imported china should indelibly bear the name of the country of origin. It is very rare that a china manufacturer does not indelibly put his name on the china. The country of origin could be simply added at no additional cost.

e. Eliminate the presidential discretion in a Market disruption case so that an exporting country cannot be offended when the discretion is exercised against them.

9. We are submitting a study entitled "The Need for More Adequate Safeguards Governing Imports from Non-Market Economies" written by Professor Lee Albert of the Faculty of Law of the State University of New York. This study discloses that we cannot simply assume that dislocation costs of unrestrained free trade will be offset by long-term benefits.

STATEMENT

Mr. Chairman, my name is John C. Heebner, I am President of Buffalo China, Inc. located in Buffalo, New York. I am appearing here today on behalf of the American Restaurant China Council which is a trade association representing the majority of American manufacturers of hotel and restaurant china. The members of this association are: Buffalo China, Inc.; Mayer China Co.; Shenango China Co.; Sterling China Co.; Syracuse China Co.

With me is James L. Magavern, our legal counsel. Our products are identified as TSUS 533.20 and 533.52.

We have asked to testify here today because foreign imports, particularly imports from the Peoples Republic of China (P.R.C.) have increased at an explosive rate in the last three years and now threaten the very existence of our industry. We welcome this opportunity to present our thinking concerning options to improve the trade remedy laws which we believe are important to all American citizens as well as to our industry.

I am submitting with this statement a study entitled "The Need For More Adequate Safeguards Governing Imports From Non-Market Economies" by Professor Lee Albert of the Faculty of Law at the State University of New York. This study examines current economic thinking and explains why we cannot simply assume that dislocation costs created by freer trade policies will necessarily be offset by long term gains for the economy as a whole.

The American hotel and restaurant china industry employs about 5,000 people throughout the U.S.A. Our industry is not characterized by high wages, excessive management compensation or large dividends to stockholders. Our average factory employment cost is about $10.00 per hour as compared with $20.00 to $23.00 in some of the larger industries, and our management and stockholder compensations are similarly modest.

American restaurant china producers are located in economically distressed areas of the northeast and midwest, such as Buffalo, New York, East Liverpool, Ohio and New Castle, Pennsylvania. Further penetration of the china market by imports will increase the already severe unemployment and disruption in these areas.

The American market for hotel and restaurant china has been well served by the American producers of china. the price competition among domestic manufacturers has been very strong and has assured the consumer a fair price. This competition has been further magnified by the producers of many other table top substitutes for china. Indeed, the market has been so sharply competitive that capital investments in new facilities and equipment have, at times, been difficult to justify.

The china industry has never lacked the capacity to give sevice to the industry except during the few occasions when the American economy has been "overheated" as it was in 1975–76.

In the last decade out industry has made significant capital investments to make our factories as modern and efficient as any in the world today. In my company, we have been using computerized controls on major installations and equipment for several years. We also use solid state electronic technology throughout our process and engineering is underway to utilize the latest in the mechanical technology. This application of high technology is typical in our industry.

The information available to me indicates that my company has greater labor efficiency by at least a factor of four when compared with the Chinese factories we are competing against in the American market. Despite this tremendous difference in efficiency, the Communist Chinese imports are being priced 30 percent under our maximum volume discounted prices. We have little defense against the Chinese Communist government that has targeted our market and is now buying market share without regard to what we call cost, investment, and profit.

As seen in the figures below, imports from the Peoples Republic of China have increased at a truly explosive rate since they received Most Favored Nation (MFN) status in February 1980:

P.R.C., dutiable quantity

Year:	*Dozens*
1975	1,872
1976	16,228
1977	23,912
1978	44,812
1979	32,776
1980	520,340
1981	708,605
1982	[1] 737,863

[1] Imports from Hong Kong were 184,572 in 1982 and probably were from the P.R.C., bringing the true P.R.C. total to 922,434.

Source: Department of Commerce.

Within but three years of MFN tariff reductions, the P.R.C. has become the dominant foreign supplier of hotel and restaurant china in this country. P.R.C. sales have already dominated the sales of plain white undecorated china in U.S. Markets. All of the goods from the P.R.C. are mere copies of high volume patterns of American producers, without technical improvements or innovative design.

Three distinct sources confirm that P.R.C. export prices are set by their government at a level they consider necessary to obtain market dominance:

1. Ceramic Bulletin, September 1980.
2. Consulting report written by Ernst & Whinney for A.R.C.C. dated February 1981 entitled "Competitive Factors of Imports."
3. Seminar entitled "Doing Business in China,"June 1981, sponsored by Ernst & Whinney and senior representatives from China's Ministry of Finance.

Their prices do not establish that the P.R.C. is more efficient in making restaurant china than American producers. but they do reflect a government subsidy which cannot be equated with comparative advantage. In effect independent American companies are being required to compete against a Chinese government whose policy is to displace and thus injure American producers. Predatory pricing practices are illegal under our anti-trust laws; yet a similar practice is being employed by a Communist nation and our concept of free trade will permit it.

I estimate that our industry is operating today at no more than 55 percent of its capacity, and that half of our companies operated at little or no profit in 1982. I estimate that unemployment in our industry is now at about 35 percent and without protection from the flood of imports from the P.R.C. it will probably increase. In my 14 years' experience, 1982 was the most financially difficult year for our industry.

Continued erosion by subsidized prices from foreign sources will cause domestic manufacturers of hotel and restaurant china to lose a major portion of their market and some will be forced to close their plants. The survivors will not be able to fund modernization programs and in time will not be able to meet their union negotiated wages, pensions, and insurance obligations.

The present trade remedy laws do not seem to work for a small competitive industry such as ours primarily because of the extreme legal costs in pursuing remedies, the complex problem of obtaining usable data and the overriding political decisions governing relations with specific foreign nations.

A Section 406 market disruption case might seem to offer apopropriate relief to our industry. Yet, to our knowledge, there has never been a successful case against P.R.C. and the prospect of Presidential veto has deterred us and other industries from pursuing meritorious but expensive cases.

U.S. trade relations with Communist nations are far more subject to abrupt and unpredictable shifts and dislocations than is the case with market economies. For example, the MFN agreement with the P.R.C. in 1980 led to a sixteen-fold increase of P.R.C. exports of restaurant chainaware to our country—in just one year. New trade arrangements with Communist nations pose special dangers to our economy because the kind, quantity, and price of their exports are determined by administrative fiat. Severe economic dislocations are likely to follow in the wake of such arrangements. A market disruption determination should not be subject to the President's veto because the mere existence of discretion means that an exporting country will be offended if the discretion is exercised against them.

The issue is not whether the P.R.C. should be treated in the same manner as mations having market economies. The unavailability of meaningful cost-price information makes that impossible. Ultimately the question is whether the P.R.C. and other non-market economies are to enjoy a privileged exemption from the "fair" competition mandates of U.S. trade laws.

The fundamental problem of requiring American companies to compete in the American market against foreign Communist governments must be addressed. This issue becomes increasingly severe among smaller American companies who employ the largest part of our work force. Large multi-national companies are less vulnerable and in some cases are part of the problem.

One approach to this problem is to apply a restrictive quota to all imports from communist and other non-market nations so they cannot undermine an American industry by their government's decision to target a market. Increases in such restrictive quotas could become subjects of negotiation and give time for domestic industry to be heard and for them to act in defense. This system would imply that a Communist nation would be required to apply for entry into the American market rather than have the opportunity to overwhelm it. I understand that all E.E.C. countries except Denmark and Ireland have restrictive quotas against the importation of china from Communist China.

Free trade economists agree that changes in tariff levels or other trade barriers should be phased in to prevent economic disturbances during transition periods. This proposal quota system is a mechanism to deal with these disturbances.

In addition, by assuring a measured increase over time, quotas obviate the possibility of significant market penetration followed by an abrupt withdrawal from the American market in accordance with new economic priorities of a government-controlled economy. There are insignificant benefits from the short-term availability of cheap imports, while dislocation costs are greatest in the short run.

The anti-dumping and countervailing duty remedies do not provide a realistic solution for our industry for these basic reasons:

First, it is so expensive to conduct, only a large company or large trade association could afford to pursue such a case. The A.R.C.C. determined that it would cost $150,000 just for us to determine if we had a viable case. All the legal costs involved in the pursuit of the case would be in addition to that.

Second, the characteristics of a state-controlled economy prevent meaningful or reliable determinations of cost or fair value. It should be noted that there is no home market in Communist China for American restaurant china today. If western style hotels and restaurants are built in China, a market can develop, but there is none today. Surrogate measures of cost or prices have been used but these are expedient and artificial approximations, sadly lacking in economic validity or reliability. The development of cost data is so forbiddingly complex and expensive, the imports from communist countries are virtually immunized from anti-dumping and countervailing duty remedies. American producers competing with non-market imports, like the restaurant china industry, do not enjoy the level of protection afforded other U.S. industries which compete with market country imports.

Third, even if we could discover that P.R.C. prices did cover their production costs, the enormous differences in the living standards of that nation and ours creates a genuinely philosophical problem. For decades, there has been a sustained effort in the U.S.A. to enact laws that enhance the standard of living of the American industrial worker as well as all other citizens. We have succeeded and now have one of the highest standards of living in the world. I think we must find an equitable way to trade with state-controlled economies who target our markets without putting the American industrial worker on the unemployment rolls.

I suggest that we consider using the federal minimum wage as a basis for a determination of labor costs and thus the minimum selling price for non-market imported goods in the U.S. Although contrary to free trade postulates, the proposal is one way of reconciling the real and immensely difficult conflict between our social legislation to maintain living standards and that of international trade.

The federal minimum wage is deemed by Congress to be the lowest wage an American citizen should be paid in a manufacturing industry. Requiring the foreign manufacturer to price his goods in accordance with our minimum wage instead of at the abnormally low-wage levels of other nations, such as the $.30 per hour in the P.R.C., would allow efficient American manufacturers to compete and provide jobs. It would not assist industries with high employment costs or inefficient facilities. Allowing the foreign thirty (30¢) cent wage to prevail is to export even our efficient manufacturing employment to the country with the low standard of living. Instead of protecting the American worker with the dignity of a job at a decent wage, we will have exported his job and left him unemployed and perhaps dependent on welfare. Even using the American minimum wage of $3.35, the P.R.C. manufacturer retains a significant labor advantage, since labor costs in our industry average about $7.00 per hour and total unemployments costs about $10.00.

As Professor Albert points out the common claim that American workers will find new employment through training and education in high technology industries can no longer be assumed to be valid. The transition takes considerable time, during which the costs of import-displaced employment exceed unemployment compensation payments. For many individual workers, especially in the distressed urban areas where our industry is located, there is no real possibility of transition to another job—only to unemployment. It is true that high technology industries may employ low-skilled workers. But these high technology jobs are as vulnerable to import-displacement as the so-called smokestack jobs. We now know that this country has no monopoly on the use of sophisticated technology and that such technology and innovation are easily transportable to low-wage nations where a product line may be produced at lower cost and then sold in American markets at low prices. Our new industries soon become as vulnerable as our old to foreign wage differentials. For example, I cite the recently announced move of Atari to Taiwan.

As discussed in the study by Professor Lee Albert which I am submitting with this statement, economists now recognize that freer trade policies may be excessively costly. In acknowledging that the economic benefits from freer trade are far more modest than is commonly supposed in orthodox economic theory, modern economists no longer ignore the severe economic disruptions and dislocations that often follow from changes in this nation's foreign trade or commercial policy. Once we recognize that economic resources, workers and productive machinery do not costlessly move from one industry to another, the net result of a freer trade policy may be negative, or the gains may be trivial.

The effect of granting MFN status to the P.R.C. is an example of a major trade policy change entailing the danger of severe dislocation costs. Large tariff reductions produce new flows of imports that impact upon certain American industries. During a transition period of uncertain but substantial duration, expensive machinery and technology in the impacted industries lose much or all of their economic value. Common experience and economic studies reveal that displacement costs for American workers are equally substantial. Where an import competitive industry lays off workers, such workers do not readily find employment elsewhere. People's next best alternatives are well below their best ones, especially after they have become committed to their current jobs through choice of residence and personal skills. Where an economy is already marked by high unemployment and idle capacity, import caused displacement costs are significantly higher and exceed the gains to be expected from freer trade.

Equally significant, the gains from low-priced imports are highly diffuse and only realized over time; whereas the losses are immediate and concentrated.

The American Restaurant China Council estimates that the cost of domestic china per meal served is less than $0.01 per meal. Therefore, the benefit to the consuming public from the lower priced imported china is insignificant and probably not measurable. On the other hand, the costs of unemployment and idled china manufacturing assets is very high, measurable, and concentrated in already distressed areas. It is the task of public policy to ameliorate or prevent the costly demoralization associated with loss of job, position, or investment. I submit that our proposal to employ the U.S. minimum wage as the basis for protection of our workers against loss of their jobs to low-wage countries would be an appropriate policy to that end.

Meaningful reform of U.S. trade laws is both timely and necessary. Simpler, less expensive procedures need not produce a loss in precision, since the latter is an illusion under present complex standards. For imports from Communist nations, a surrogate cost-price inquiry to determine dumping or export subsidy is cumbersome, artificial, and unreliable. What is needed is some form of minimum price remedy.

I suggest that the use of the average export price from a representative group of free market countries would greatly simplify the process as well as preserve some equity for the standard of living in the U.S.A. This price would be intended to be the price at which goods would be exchanged under normal free market conditions. Relying on prices in at least several market economies avoids inquiry into whether a particular home market price is distorted by domestic policies and avoids the perplexing task of searching for an economy "comparable" to the non-market country. Such a standard also allows non-market producers to predict the lowest lawful price in advance of legal proceedings. It avoids the will o' the wisp search for the "true costs" of production in a non-market economy.

From our standpoint, there is one final improvement in the laws that would be meaningful and that is to require that all foreign products be indelibly marked with their country of origin. This will eliminate the use of adhesive stickers which are lost during washing and thereby permit palming off copies of American china by both importers and American manufacturers with facilities abroad. This is not a difficult problem to solve. It is rare that a manufacturer does not indelibly mark the china with his name. Adding the country of origin does not create an additional cost.

I wish to thank you for the opportunity of being heard on this complex and critical matter. The future of American manufacturing industries deserves this attention.

Chairman **Gibbons**. Yes, sir, it certainly does. I agree with you. It is a very difficult problem to solve. Your suggestion of using the minimum wage as the basis for computing cost is one, of course, that we have often thought about, but you are the first person that has ever come here that I remember that has advocated that as a solution. It may be what we ultimately have to do with these nonmarket economies.

Mr. **Heebner**. Well, I have a difficult problem, sir, with the philosophy of the Federal minimum wage, which I think is an important law, an important philosophy. And we have that on the one hand, and then on the other hand we say we are going to just transfer the jobs out of the country and make the person unemployed.

Chairman **Gibbons**. Well, certainly we need to shift a little more of the burden to the nonmarket economies in this matter. I will study your proposal. I appreciate your coming to make it. We will see what we can do. You had a number of good proposals.

Mr. **Heebner**. Thank you for hearing us.

Chairman **Gibbons**. Thank you.

There are a number of other excellent witnesses that I want to hear. I wish that I could hear them today, but the time has expired, and that will conclude the hearings. We will get back to this issue just as rapidly as the schedule will allow us.

Thank you very much.

[Whereupon, at 1 p.m., the hearing was adjourned, subject to the call of the Chair.]

OPTIONS TO IMPROVE THE TRADE REMEDY LAWS

WEDNESDAY, MAY 11, 1983

House of Representatives,
Committee on Ways and Means,
Subcommittee on Trade,
Washington, D.C.

The subcommittee met, at 9 a.m. pursuant to notice, in room B-318, Rayburn House Office Building, Hon. Sam M. Gibbons (chairman of the subcommittee) presiding.

Chairman **Gibbons**. Good morning, ladies and gentlemen. We hope that this will be our concluding hearing on this subject today. We appreciate the patience of so many of you who have come and had to be turned away because we ran overtime.

We are looking at the trade remedy laws dealing with fair and unfair trade practices and how we can improve the operation of our trade laws. This is an oversight and legislative hearing on these trade functions.

We are happy to have you with us today. Our first witness this morning will be Ms. Archibald, who will talk to us about the Section 301 Committee of the USTR Office.

STATEMENT OF JEANNE S. ARCHIBALD, CHAIRMAN, SECTION 301 COMMITTEE, OFFICE OF THE GENERAL COUNSEL, U.S. TRADE REPRESENTATIVE

Ms. **Archibald**. Thank you, Mr. Chairman I am Jeanne S. Archibald, Assistant General Counsel in the Office of the U.S. Trade Representative and Chairman of the Section 301 Committee. I am pleased to have this opportunity to testify before you today on our trade remedy laws and particularly on the operation of section 301 of the 1974 Trade Act.

Section 301 is unique. Unlike the other trade remedies the subcommittee is reviewing, section 301 is not limited to a discrete function.

In enacting section 301, Congress intended to create a multipurpose trade tool able to deal with a wide variety of problems not within the scope of the other trade statutes. It is this multiplicity of purpose and the corollary flexibility provided by the statute that sets section 301 apart.

It is the only statute that provides domestic interests with an opportunity to request the U.S. Government to intervene on their behalf at the international level with respect to trade disputes.

The 1979 amendments to section 301 have emphasized this particuar characteristic by directing USTR, after an investigation has been initiated, to request consultations with the foreign government involved and, where applicable, to pursue dispute settlement under the GATT or the codes.

Section 301 is also unique in that it is the only trade statute which can address the problem of barriers to U.S. exports, both of goods and services.

It thus becomes a negotiating tool for liberalizing trade and opening foreign markets, especially in areas, like services, where international rules are few.

Section 301 is thus far broader than other statutes which are intended as domestic counterparts of particular international trade rules. It is a substantive grant of significant authority to the President to react to foreign trade practices as well as a procedural vehicle for private U.S. interests to have trade issues raised internationally and a negotiating tool for the U.S. Government which is especially useful in areas where no international trade rules have yet been developed.

Because of these unique features, section 301 is as much a trade policy tool as a trade remedy, with policy considerations playing an important role in many cases.

Some of the criticism of the discretion inherent in section 301 which has been voiced in these hearings reflects a lack of appreciation of section 301's dual nature.

Efforts to limit the President's discretion and to limit the function of section 301 to a trade remedy of the type embodied in the CVD or antidumping law, as some have suggested, ignore the essential policy and negotiating functions which Congress recognized as necessary to U.S. efforts to achieve trade liberalization.

Let me turn now to the operation of section 301. Since 1975, USTR has initiated 39 investigations. We currently have one petition before us on which a decision regarding initiation of an investigation must be made by May 23.

It is interesting to note that in the first 6 years of administering this statute, USTR initiated 21 investigations. Since October 1981, USTR has initiated an additional 18 investigations. Thus, 46 percent of all investigations under section 301 were initiated within the last 20 months.

When a petition is filed, USTR reviews it for legal sufficiency and substantive merit and considers the policy implications of initiation of—or failure to initiate—an investigation.

The authority to decide whether to initiate an investigation is USTR's. Before making that decision, however, we request the advice of the interagency Section 301 Committee.

Although USTR was given discretionary authority in 1979 to reject petitions for policy reasons, such action has never been taken. In fact, only one petition has ever been rejected; in that case, the petition failed to provide supporting evidence for its allegations.

Some criticism has been leveled at USTR's petition requirements as being onerous. If you examine that criticism closely, I think you will find that many of the individuals taking that position favor adoption of a system whereby bare allegations, unaccompanied by any supporting information, are sufficient to initiate a 301 investigation. Such a system is neither necessary nor productive.

Present petition requirements call for petitioners to identify with specificity the foreign practices at issue—copies of foreign laws or regulations are requested, but not mandatory—and to demonstrate that the action is unfair within the meaning of section 301.

In practice, we ask petitioners to supply only that information on foreign practices that is reasonably available to them and, indeed, we will seek information from foreign governments where necessary to assist in the preparation of petitions.

Petitioners are also required to present information concerning the volume of trade involved and the impact of the unfair practice on petitioners and on U.S. commerce.

It is not true that USTR requires a petitioner to prove his entire case before it initiates an investigation.

On the other hand, it is not sufficient for petitioners simply to assert an adverse effect without some reasonable supporting evidence. While we recognize the difficulty that private industry can face in obtaining detailed information of foreign practices, this should not apply to the question of adverse trade effects where petitioners presumably have firsthand knowledge.

These petition requirements are not onerous as evidenced by the increase in the number of cases initiated in recent months. Less rigorous requirements would encourage pure fishing expeditions and would greatly diminish our ability to make the most effective use of the international dispute settlement process.

In addition, USTR has a well-established practice of assisting those who wish to petition, both in terms of seeking information from foreign governments and in advising them as to the type of information to be included in the petition.

This is something that we have done particularly in the case of individuals who do not have use of counsel or have not worked in the 301 area in the past and need particular assistance.

Furthermore, we believe it is appropriate to consider substantive merit as one factor, and indeed an important factor, in a decision on initiation.

In cases involving allegations that foreign governments have acted in a manner inconsistent with their international obligations under the GATT or the codes, it is reasonable to consider the likelihood that such allegations will be upheld in the GATT or the codes.

Upon initiation of an investigation, USTR is required by statute to request consultations immediately with the foreign government involved. Where appropriate, these consultations are held under the GATT or codes.

This provision has already caused considerable difficulty since it requires the U.S. to present its case in the international arena on the same day on which an investigation is initiated and in some cases before our case is fully developed.

If the consultations do not lead to a resolution of the problem, we are required to pursue dispute settlement, that is, conciliation where it is appropriate, and establishment of a dispute settlement panel.

Currently, we have 12 cases in the consultation process and four in the panel process.

Thus far, the domestic investigation and the international dispute settlement process have not operated in tandem as envisaged under section 301. In a number of cases, the international process has not been completed by the time USTR was required to make a recommendation to the President.

In some cases, this has been due to the complex nature of the U.S. complaint, in others to unwillingness on the part of our trading partners to pursue consultations and dispute settlement expeditiously.

Some of the problems we have encountered, that is, a refusal to consult, have not recurred. Others, such as the inability of a subsidies code dispute settlement panel to review a complex complaint, hear arguments and report its findings within 2 months, which the code envisions, are likely to remain.

As we broaden our experience on dispute settlement, we will attempt to resolve these problems.

If we have not resolved a trade problem during the course of the 301 investigation, we are required to make a recommendation to the President within the time limits of section 301 as to what action, if any, the President should take in response to the foreign practice.

Although the time limits are tight with respect to certain types of cases, notably those involving subsidy issues, we have thus far met our deadlines. However, because of the delays in the GATT dispute settlement process noted above, GATT action has not always been completed by the time USTR has submitted its recommendation to the President.

For this reason, the President has chosen in several cases to limit his action to directing USTR to continue the dispute settlement process.

The effectiveness of section 301 in responding to foreign unfair practices should not be measured in terms of the number of times the President has retaliated. In a very real sense, retaliation is a measure of failure since it occurs only when we are unable to resolve the petitioner's problem.

The authority to retaliate was conferred in order to provide the necessary leverage to achieve a resolution of the problem. The retaliation authority is more effective in its availability than in its use.

This is borne out by the fact that nearly 70 percent of all completed 301 cases were satisfactorily resolved short of retaliation. Furthermore, the same leverage has enabled us to resolve disputes within the initial 45-day petition review period or, indeed, even before a petition is even filed.

Section 301 does not operate perfectly. Nevertheless, given the variety and complexity of issues raised under section 301, it has been, and remains, a useful, effective tool to respond to unfair foreign practices.

This completes my statement, Mr. Chairman. I would be happy to answer any questions you may have.

Chairman GIBBONS. Why does it take so long to get decisions on such cases as citrus and poultry and wheat flour?

Ms. **Archibald.** There are many reasons why the GATT cases have taken as long as they have. Indeed, we have not been happy with the length of time that a number of these cases have taken, as you have heard from administration witnesses and others.

Let me run through a couple of the cases to give a flavor of the kind of problems we run into. I will begin with a general qualification, and that is that probably the biggest problems have been in the subsidies code.

I think that is because our expectations were very high. The time limits are extremely short, 7 and 8 months approximately; and when we first acceded to the code, we hoped that these time limits could be met.

In fact, our experience has been that they have not been met. However, we have only taken a very few cases, four in total, and only two have gone as far as the panel process in the subsidies code, so it is difficult to generalize on the basis of this short amount of experience.

I will run through the kinds of problems that we have. In each of these cases, including wheat flour, pasta, poultry, sugar, we initiated the GATT process on these cases all within a 2-month time span.

So we essentially put a very heavy burden on the process intially by bringing four cases within 60 days. It was to be expected that the first few cases would be bumpy. We ran into problems we did not anticipate; the refusal of the European Community to consult in one case. That particular problem has not occurred before.

Chairman **Gibbons.** What did we do when they refused?

Ms. **Archibald.** We tried to convince them that they had to abide by the rules and consult, and when they wouldn't, we went to the Code Committee, indicated that we had requested consultations, the European Community had refused and we were now requesting conciliation.

That process was completed within the time limit required by the code and since it did not result in resolution of the dispute, we moved to a panel. There was an initial delay because the European Community first took a very long time responding to our request for consultations and responded with a refusal.

Chairman **Gibbons.** What case was that?

Ms. **Archibald.** That is the pasta case.

Chairman **Gibbons.** Take that case before you, go on with the answer and trace it on through. What other remedies were available when the European Community refused to consult?

Ms. **Archibald.** You mean directly to the petitioners?

Chairman **Gibbons.** To the petitioners or to the U.S. Government.

Ms. **Archibald.** That was a particularly interesting case. Pasta is the first time that a code case has been taken which challenges directly the consistency of a subsidy with article 9, which is, of course, the very rigorous prohibition against export subsidies on nonprimary products.

So it was one we were interested in taking to the code because we wanted to test that provision, but it was also brought to us under 301 rather than under the CVD law, because petitioners were of the opinion that they could not bring their case under the CVD law.

Although we were dealing with an imported product that was subsidized, the area within the United States adversely affected was confined to the east coast. Yet, under the countervailing duty law that area did not qualify as a regional market.

They felt they would be unable to meet the injury test because the International Trade Commission would have been forced to look at the country as a whole and it was clear that the imports were fairly small when you looked at the whole country, although heavy on the east coast.

They brought it to 301 and I don't think they had another domestic remedy that would have assisted them. In terms of what the United States could do when the European Community refused to consult——

Chairman GIBBONS. Were there any other courses of action the United States could have followed?

Ms. ARCHIBALD. Under 301, the President has authority to retaliate. We thought that was premature then. We had only just initiated the investigation and thought it best to move to the next step in dispute settlement and it has continued along that line.

The findings of the panel have been submitted in confidence to the disputing parties. I can't go into the details of that report in a public hearing, but it will be sent to the Code Committee probably by next week and we expect action on it sometime within a 30-day period following that.

Chairman GIBBONS. Do you think we are going to have any more refusals to consult?

Ms. ARCHIBALD. I don't. That was the only time it has occurred. There were other problems with the other three cases in that there were delays in getting the consultation process started. We were, of course, testing a totally untested code at that point. I don't think thorough thought had been given to how they were actually going to implement some of the new procedures they had put into place.

Our adversary in these cases, the European Community, behaved as I think one would expect an adversary to behave. You try to do what is best for your own side, and so when possible they tried to insist that we meet the requirements of the code in terms of the detailed description we would give of the subsidy practices.

I think those problems were not unexpected in an initial thrust to test the code, and they have not been repeated to any great extent in later cases.

But they were definitely a problem initially. Now, another kind of problem that has occurred has been the—well, the conciliation process has worked rather well.

In the few cases that have gone to conciliation, the Code Committee has come close to meeting its 30-day deadline, although it has not resulted in any case so far in an actual conciliation.

We have not been able to resolve a dispute at that stage. The panel process and getting to the panel process has been a problem in a few cases.

Poultry is probably the best and the worst example. The poultry case has been a major problem for us from the beginning and there has been fault on all sides, the United States as well as other countries.

The initial problem there was that the case failed to include a major subsidized exporter in the initial complaint and it took us a considerable amount of time to go back and do the research necessary to bring them in.

Once having made the decision to bring them in, we then ran into serious problems in getting the Government of Brazil to schedule a date for those consultations. It took an unacceptably long period of time.

We have gotten past that and intend to move to the conciliation process in the case. The initial error was our own for not having picked up on this country earlier and then was compounded by their own unwillingness to move the process along expeditiously.

As you know, things like the GATT ministerial cause great problems in scheduling the cases for the GATT last year. There were not rooms and time schedules available.

This probably sounds equally odd to Americans, but as you know, the GATT essentially closes down during the month of August and you cannot get business done during that month. These are very real problems that we face.

Since, in fact, the panels are as much our judges initially as anything else, there is a hesitancy in going too far and antagonizing them by setting dates that suit our domestic statute.

Let me give another example of the time problems. I want to emphasize that occasionally the time limits work against us as much as they work for us. For example, in the FIRA, which is not a 301 case, but one we have been presenting on our own to the GATT——

Chairman **Gibbons**. Canadian FIRA case?

Ms. **Archibald**. Right. The panel moved quite quickly, met in December and again in January, issued its factual findings early in March, and, of course, the two countries who are disputing have the opportunity to review those findings and to make sure that they are not in error.

We took an opportunity to comment on those, so did the Canadians. We felt it was in our interest to make a subsequent comment based on what the Canadians commented. That lengthened the process a little bit, because we gave another major piece of paper to the panel, but we felt it was in our interest to do so.

In the canned fruit and raisins case, there were delays that occurred on our side because of a desire to have a complex case presented in a way we though most likely to lead to a successful resolution.

The wheat flour case is the other side; an issue which is so complex, where the rules on agricultural subsidies are very much tied into adverse effects and proving adverse effects.

We did a very detailed statistical analysis of something like 17 markets in an attempt to demonstrate that our allegations were correct. The panel, indeed, I think, although we have not been fully satisfied, as you know, with the conclusions they have reached, I think the panel attempted to do independent research of its own in an attempt to arrive at the facts in that case.

All of this takes a very long time. Under the subsidies code, panels are only supposed to take 2 months to review materials, listen to oral argument, make their findings and get them reported.

When you realize that even under our own countervailing duty law the Commerce Department can take up to 7 months to do that same job, you realize the time pressure that the panels are under.

Sometimes a quick decision may not be the best decision from our viewpoint.

On the other hand, we are not interested in unnecessary delays and we act very quickly against them when we think someone is just delaying for the sake of delaying.

I don't want to mislead you that these delay problems will not continue. I think they will. We will just have to go on a case-by-case basis trying to determine when someone has overstepped the line and when it is both to our advantage and the advantage of the GATT process that we allow an extention of the time.

We will, of course, continue to meet our domestic deadline of reporting to the President on the date required, whether or not the GATT process is finished.

Chairman **Gibbons**. Mr. Frenzel?

Mr. **Frenzel**. Thank you for your testimony. You have told us a lot about 301, but you haven't given us any recommendations for improvement. Does that mean that the USTR position is that 301 should remain unchanged on the statute books?

Ms. **Archibald**. Actually not. One of the problems that I referred to in my testimony regarding the difficulty that we have experienced and which I think in some cases has contributed to delays in presenting our cases to the GATT is the fact that we have to begin presenting our case, you do not go to a dispute settlement panel the first day you initiate, but you have to begin consultations. Under the code one of the quid pro quos we got was that you had to know what you were talking about when you started and give the other side a good idea of what you were complaining about. That poses a problem because we do not always have a fully developed case.

This particular problem is one that has been addressed in the reciprocity legislation, which is now on the House side. Essentially that provides that we could, in cases involving GATT or code allegation, where necessary, take a 90-day period prior to initiating the dispute settlement process to do the investigation necessary so that at the time we completed it we would know, yes, we have a case, and we are ready to move and move quickly. That particular provision I think will go a long way toward helping us in moving these 301 cases.

There have been a number of other fairly minor problems on 301 which I will not trouble you with here. We may come back in the future and have other suggested changes, but our experience of the relationship between the GATT and the codes has only been tested to a small degree thus far. Relatively few cases have gone all the way to the panel process. I think we will continue to learn and new problems will surface as we move along, but at the present time the major changes which we have supported in the reciprocity bill have been the 90-day period prior to initiation of the actual dispute settlement and some claifying definitions of what are unreasonable, unjustifiable, and discriminatory as those terms are used in 301.

Mr. **Frenzel**. Are you recommending the entire Danforth bill to us?

Ms. **Archibald**. Well, let me put it this way. The administration supports that bill. It probably does not represent everything that we initially would have preferred to see, but it is something that we think will solve some of the problems that we have experienced to date. At this point we are not prepared to make new suggestions that go beyond that.

Mr. **Frenzel**. Is your testimony today confined solely to 301?

Ms. **Archibald**. Yes, it is.

Mr. **Frenzel**. Thank you very much, Mr. Chairman.

I yield.

Chairman **Gibbons**. Let us go back to 301 cases. What can you tell us about the Houdaille case? You are finished with that?

Ms. **Archibald**. Yes, the Houdaille case was not a section 301 case, although it was brought under section 103 of the 1971 Revenue Act, which was verbatim taken out of the same statute that 301 came from, and the criteria are very similar. It was the first time that anyone had ever brought such a case to the President, and because there was no administrative practice established with respect to it and because there are no regulations in dealing with it from a procedural standpoint, we tried to follow as closely as seemed reasonable the practices that have developed in section 301. Therefore when the case was filed we published a notification it had been filed, requested public comment, received a good amount, set up an interagency committee, not the interagency 301 Committee, but the same agencies who sent individuals to review the case and to make recommendations that eventually went to the President. You are correct, the President has made his decision with respect to the remedy that was requested in that case.

Chairman **Gibbons**. You still have the Houdaille case around the office?

Ms. **Archibald**. Certainly the issue is one that is very much alive. The *Houdaille* case is in fact probably one of the prime examples of the entire targeting issue. As you know and as Ambassador Smith and others have testified, targeting is of great concern to the United States. Bill Krist, who will follow me, I think will talk a little further about it. We are right now beginning consultations with the Japanese on the general issue of targeting. I have no doubt that the information that was developed and the depth of understanding that we have developed as a result of the Houdaille case will be useful to us in furthering our understanding of exactly what the Japanese do when they target, whether it is trade distortive, if so how, and then what we should do about it.

Mr. **Frenzel**. If the chairman will yield, Houdaille of course started with the investment tax credit.

Ms. **Archibald**. That is correct.

Mr. **Frenzel**. Then they went to 301. I assume they have gone someplace else.

Ms. **Archibald**. That is not exactly right. They filed under 103. They have never made a formal request under 301. When we reviewed the case, since like 301, 103 is a discretionary remedy with the President, we did not confine our review solely to 103. We looked at things like whether or not the practices were primarly subsidy practices and would CVD be more appropriate or was there really an unfair practice here at all, and therefore would 201 be more appropriate. The decision was confined to the remedy requested. The petitioners are free to seek other avenues of redress.

Mr. **Frenzel**. Are they seeking 301 or 201?

Ms. **Archibald**. I am not aware of that, although I believe they are giving strong consideration to what steps they should take from here on then.

Chairman **Gibbons**. The process of targeting concerns me, because I feel that it will lead to a certain breakdown of the entire market system if we do not get it under control. From your experience in the 301 cases, is this a matter that can be handled under 301 appropriately?

Ms. **Archibald**. Let me begin by saying that in targeting the first step is to define what we mean, and there are certainly aspects of what is commonly called targeting which clearly come under a variety of trade statutes that we are dealing with. For example, subsidies. We do have a countervailing duty law and that aspect of targeting if you are dealing with an imported product can be handled under countervailing duty laws. We have not, as you know, finished our review of just what targeting is, nor defined and established standards for what parts of targeting are appropriate and what parts are inappropriate, nor if we find any that are inappropriate, establish standards to measure the impropriety of the act, and standards to determine whether or not they are trade distortive. When we have done that we will be able to look through the trade statutes and determine whether we need a new tool.

Section 301 is an incredibly broad statute. "Unreasonable" is undefined, it is solely at the President's discretion. He has to articulate a reason for finding that something is unreasonable and a burden, but there is very little I can think of offhand that could not fall under such a definition. This is not a general invitation to people to start filing 301 cases on targeting, but I think we have tools at our disposal to deal with short-term problems while we complete this study that we are doing in an attempt to get a much better handle on targeting.

Chairman **Gibbons**. I realize that I may be wandering outside the area that you deal with the most. I have thought that perhaps by making our countervailing duty statute a little more available and perhaps changing some of the definitions and criteria that we could get at targeting through that law. Have you thought about that?

Ms. **Archibald**. I have, sir. In fact I have sat through a couple of these hearings and listened to that question being posed to other witnesses. You are correct, I do not deal in that particular area as much as I did once when I was with the committee, but from my own background knowledge of the countervailing duty statute, and this is a personal opinion, I am not speaking for the agency, it strikes me that you are going to have difficulty in doing that. A major obstacle will be in trying to quantify the practices that you are talking about. If I can use some of the things that were alleged in the Houdaille case as examples, certainly there were subsidies but that was not the initial practice that Houdaille was most concerned about. It was most concerned about an internal industry cartel which existed in Japan among the machine tool builders.

There is no doubt that the Japanese had an industry association and that the Japanese statutes directed the industry to hit certain production targets or to do certain types of R&D, and indeed also seemed to indicate that Japan would be very helpful in trying to secure the funds for that kind of R&D. But it is not clear to me how you would quantify the effects of, say, the Government telling each producer to produce 50 machining centers per month. How does that get quantified into a subsidy? That would be your first and very major problem.

The second problem is trying to make this consistent with the international codes. The GATT subsidies code, while not a model of specificity, is on some areas particularly specific, and I would imagine we would get an enormous amount of adverse comment from our trading partners if we somehow took these practices which are not subsidy practices in the sense the word is usually used and nevertheless unilaterally countervail against them. I can see those as being two major obstacles you face. That does not mean that targeting is not an issue of major importance, but I think before designing a remedy we need to have defined more clearly what the problem is and upon achieving a sound and specific definition, it will be easier to determine whether we need new remedies or whether a creative use of existing remedies would be sufficient.

Chairman **Gibbons**. Mr. Pease.

Mr. **Pease**. No questions, Mr. Chairman.

Chairman **Gibbons**. Thank you, Ms. Archibald.

[Questions and answers follow:]

Question. It is my understanding that during consideration of the Houdaille petition an ad hoc interagency committee put together a list of acts about the case and Japanese practices that were unanimously agreed to by the committee participants. These facts, as I understand it, documented the existence of such measures as subsidies for the Japanese industry, financial assistance from the Government of Japan, and collusive activity by the Japanese machine tool industry. Am I correct?

Answer. As in any unfair trade practice case examined by USTR, the interagency review process in the Houdaille case began with an examination of the facts and law relevant to Houdaille's petition. That examination revealed that subsidies are available to the Japanese machinery industry as a whole. However, the interagency group was unable to determine the extent to which the Japanese machine tool industry or, more specifically, the manufacturers of numerically-controlled machine tools benefitted from such subsidies. The factual examination also revealed that some Japanese manufacturers of certain types of machine tools had in the past, acted jointly with regard to some of their commercial activities. We could not ascertain whether this practice still occurs.

Question. I further understand that it was agreed in that case that a high percentage of the agreed facts would support a case under section 301 of the Trade Act and/or a GATT complaint. Am I correct in this understanding?

Answer. The question considered by the staff-level ad hoc interagency committee to which you refer was solely whether taking action under Sec. 301 on the basis of Japan's practices and policies in the machine tool sector and their effect on U.S. commerce would be legally defensible in court. Since the standard for judicial review would be whether the President had acted ultra-vires or in an arbitrary and capricious manner, the committee was of the opinion that action under Sec. 301 would not transgress those standards. The Committee was also of the opinion that some of the issues raised by Houdaille presented a colorable claim under the GATT. However, no opinion was expressed as to the likelihood of success on the merits.

Question. If this is the case, was any consideration given to self-initiation by the President of a case under section 301 involving Japan's industrial policies toward the machine tool industry?

Answer. It would be inappropriate in USTR's role as adviser to the President on trade policy issues to disclose specific advice given to the President on any individual unfair trade practice case. However, in fulfilling its advisory role, USTR, of course, considers all options open to the President.

Question. In February, Ambassador Brock informed Members of the Subcommittee on Trade that he had been instructed to tell MITI that a consensus had been achieved in the Executive Branch on the Houdaille case, that adverse trade effects had been found, and that the only issue remaining was what remedy would be implemented. Between February and April that consensus and decision changed somehow. Can you explain what events caused that change?

Answer. It is true that in February, the basic analytical work on the facts of the case had been completed and that the next question to turn to was whether remedial action was appropriate. After interagency review and discussion the President decided in April not to grant the remedy requested by Houdaille. The U.S. did, however, begin a dialogue on the effects of Japan's industrial policy which is referred to in the next question.

Question. At the time that he denied relief for Houdaille under section 103 of the Revenue Act of 1971, the President announced the initiation of bilateral discussions with the Japanese on our respective industrial policies and the effects that they have on international trade flows. What results do you expect from these discussions? Could you forsee initiating a machine tool case under section 301 if those results are not achieved?

Answer. As a result of these discussions we expect to improve considerably our understanding of the purpose, implementation, and effect on U.S. commerce of Japan's industrial policy both generally and with respect to specific industries. We would not rule out the possibility of self-initiated Sec. 301 investigation if the circumstances called for it.

Chairman GIBBONS. Now we have an administration panel on import relief under sections 201, 406, and 232:

Mr. Ervin, the Director of Operations, USITC, Mr. Krist, Assistant U.S. Trade Representative for Industrial Trade Policy, and Michael Hathaway, [illegible] Deputy General Counsel; and Vincent DeCain, Deputy to the Deputy Assistant Secretary for Export Administration, Department of Commerce. We will take Mr. Ervin first.

STATEMENT OF CHARLES ERVIN, DIRECTOR OF OPERATIONS, U.S. INTERNATIONAL TRADE COMMISSION

Mr. ERVIN. Good morning, Mr. Chairman, and members of the subcommittee. On March 16, 1983, the Chairman of the U.S. International Trade Commission, the Honorable Alfred E. Eckes, gave a statement before your committee which fully reflects the position of the senior staff. My remarks will simply amplify his observations.

In regard to section 201 and section 406, section 201 of the Trade Act of 1974 requires the Commission to determine whether articles are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to industries producing a like or directly competitive product. The word "substantial" is defined as being important and not less important than any other cause. The modifier "serious" implies a higher level of injury than that required for an affirmative determination in a dumping case.

The Commission is allowed 6 months in which to conduct its investigations. In the case of an affirmative finding, the President has two additional months to make his determination whether to accept the Commission's recommendation, provide an alternate remedy, or do nothing. He may request additional information and receive an extension of 15 days in these tight deadlines. Should the President not accept the recommendation of the Commission, the Congress has 90 congressional work days in which to override—in both Houses—the President.

[A list of the USITC investigations completed follows:]

USITC INVESTIGATIONS COMPLETED UNDER SECTION 201 OF THE TRADE ACT OF 1974

Investigation	ITC recommendations	President's actions
Birch-door skins (TA-201-1)	No relief	
Bolts, nuts and screws (TA-201-2)	No relief	
Wrapper tobacco (TA-201-3)	No relief	
Asparagus (TA-201-4)	Import quotas [1]	No relief (March 10, 1976.
Stainless and alloy tool steel (TA-201-5).	Import quotas [2]	(orderly marketing agreement no later than June 14, 1976. Import quotas (March 16, 1978) Proc: issued June 11, 1976.
Slide fasteners (TA-201-6)	Adjustment assistance [1]	Adjustment assistance (April 14, 1976).
Footwear (TA-201-7)	Rate increase (3 Comm.)[2] Tariff rate quota (2 Comm) Adjustment assistance (1 Comm.).	Adjustment assistance (April 1, 1976).
Stainless steel flatware (TA-201-8)	Tariff quotas (4 Comm.) Adjustment assistance (2 Comm.).	Adjustment assistance (April 30, 1976).
Gloves (TA-201-9)	No relief	
Mushrooms (TA-201-10)	Adjustment assistance (3 Comm.) Tariff rate quotas (1 Comm.).	Adjustment assistance (May 17, 1976).
Ferricyanide and ferrocyanide blue pigments (TA-201-11).	Rate increase	No relief (June 1, 1976).
Shrimp (TA-201-12)	Adjustment assistance [1]	Adjustment assistance (July 7, 1978).
Round stainless steel wire (TA-201-13)	No relief	
Honey (TA-201-14)	Tariff rate quotas	No relief (August 28, 1976).
Plant hangers (TA-201-15)	No relief	
Sugar (TA-201-16)	Import quotas	Price support (May 4, 1977).
Mushrooms (TA-201-17)	Tariff rate quotas (3 Comm.) Adjustment assistance (2 Comm.).	No relief (March 11, 1977).
Footwear (TA-201-18)	Quotas (4 Comm.) Rate increase (1 Comm.) Adjustment assistance (1 Comm.).	Marketing agreement June 21, 1977.
Color TV (TA-201-19)	Import duties	Marketing agreement proc.: issued (June 24, 1977).
Low carbon ferrochromium (TA-201-20)	No relief	
Cast iron cooking ware (TA-201-21)	No relief	
Fresh cut flowers (TA-201-22)	No relief	
Certain headwear (TA-201-23)	No relief	
Cast iron stoves (TA-201-24)	Import duties [1]	No relief (September 22, 1978).
Live cattle and certain edible meat products of cattle (TA-201-25).	No relief	
Malleable cast-iron pipe and tube fittings (TA-201-26).	No relief	
Bolts, nuts and large screws (TA-201-27).	Import duties	No relief (February 10, 1978).
High-carbon ferrochromium (TA-201-28)	Import duties	No relief (January 27, 1978).
Citizens band (CB) transceivers (TA-201-29).	Import duties (3 Comm.) Adjustment assistance (3 Comm.).	Import duties (March 28, 1978).
Stainless steel tableware (TA-201-30)	Import duties (4 Comm.) Tariff quotas (1 Comm.).	No relief (June 30, 1978).
Unalloyed unwrought zinc (TA-201-31)	No relief	
Unalloyed unwrought cooper (TA-201-32).	Import quotas	No relief (October 20, 1978).
Bicycle tires and tubes (TA-201-33)	Import duties (3 Comm.) Adjustment assistance (1 Comm.).	No relief (October 31, 1978).
Fishing tackle (TA-201-34)	Import duties [2]	No relief (November 29, 1978).

See footnotes at end of table.

USITC INVESTIGATIONS COMPLETED UNDER SECTION 201 OF THE TRADE ACT OF 1974—Continued

Investigation	ITC recommendations	President's actions
High-carbon ferrochrome (TA-201-35)	Import duties (3 Comm.) Quotas (1 Comm.).	Import duties (November 2, 1978).
Clothespins (TA-201-36)	Quotas	Import quotas (February 8, 1979).
Bolts, nuts and large screws (TA-201-37).	Import duties	Import duties (Dec. 22, 1978).
Machine needles (TA-201-38)	No relief	
Non-electric cookware (TA-201-39)	Tariff increase	Tariff increase (January 2, 1980).
Leather wearing apparel (TA-201-40)	Tariff increase	No relief (March 24, 1980).
Certain fish (TA-201-41)	No relief	
Roses (TA-201-42)	No relief	
Mushrooms (TA-201-43)	Quotas	Tariff increase.
Automobiles (TA-201-44)	No relief	
Fishing rods (TA-201-45)	No relief	
Tubeless tire valves (TA-201-46)	No relief	
Heavyweight motorcycles (TA-201-47)	Quotas	Tariff increase.
Specialty steel (TA-201-48)	Quotas	Pending.

[1] Commission vote was divided evenly; the President had the option of selecting either vote as the finding of the Commission.
[2] In part.

Mr. ERVIN. An investigation of this table indicates that the Commission has conducted 48 investigations resulting in 28 affirmative and 20 negative determinations. Where the Commission has made an affirmative recommendation for import relief, the President has granted some form of relief in 10 cases. I know of no case in which the relief granted was identical to that recommended by the Commission. The Congress has never overridden the President's action.

Having reviewed these statistics, it is interesting to observe certain facts regarding America's trade situation as we find them today. The Secretary of Commerce indicated last week the United States is likely to have a trade deficit in manufactured articles on the order of $70 billion. Further, we have come through a period which is regarded as the most serious recession if not depression since the Great Depression of 1932. Thus two of the statutory criteria are generally found to exist—increased imports and serious injury.

The U.S. International Trade Commission has no investigations under section 201. The obvious question for such an unused statute is, "Why." Now, I enter into my own opinion. The pressures on international trade are so acute that they are daily topics of the evening news. The American bar, however, has had the opportunity to see what the President has done under section 201 and has concluded that the results are so capricious and so arbitrary that it has sought some other forum in which to find relief from what appears to be increased imports causing substantial injury.

The forums are section 301, and also they have sought relief under countervailing duty and dumping cases, because in my view those cases are not as subject to political action as are the 201 sections. We have gone from an average of 12 to 15 cases of countervailing and dumping per year to over 100 per year. Therefore, American industry is seeking relief but not doing so under section 201.

The question that everyone asks is, "Why have Presidents not followed the Commission's advice under section 201?" When the

United States takes action against imports, it must compensate foreign nations and place a restriction against the exports of some other domestic industry, which produces its own form of political repercussion within the United States.

Within the process of making the decision, there are a great number of issues which the President must consider which the Commission does not consider, including consumer impact. It is possible by taking an action against an imported article the consumer must pay more for a domestic article than for a foreign article, increasing the cost of living. These factors are not ones which the Commission considers.

Third, by taking an affirmative act, the President may have to pay a political cost which is in no way related to the domestic industry and this is something which the Commission does not consider.

These are three of the most obvious reasons why Presidents may not follow the Commission's advice. But the record remains as I have given it, that the primary criticism against the administration of section 201 that I have heard from the trade bar is the failure of the President to act. An examination of the record that I have given has discouraged petitioners in bringing relief for cases under section 201. The majority of cases were filed during the period 1975 to 1980.

The decline in the use of the act was most apparent during the recession of 1981-83 when serious injury was easier to prove. Currently there are no section 201 cases before the Commission. One case is pending before the President. Several congressional bills have proposed that the Commission's remedy be final, not subject to Presidential override. Since this is a policy matter between Congress and the President, the Commission has not taken a position in regard to such proposed action.

There has been criticism regarding the Commission's action. Again referring to the record above in which the Commission has found negatively 20 times, an argument has been made that the Commission found difficulty in finding imports to be an important and not less important than any other cause of serious injury when such increased imports coincided with a recession. That problem was apparent in the automobile investigation—TA-201-44—in which by a vote of 3 to 2 the majority of the Commission found in the negative in November 1980. In the last two cases, however, concerning heavyweight motorcycles—investigation No. TA-201-47—and Stainless Steel & Alloy Tool Steel—investigation No. TA-201-48—the Commission found in the affirmative despite an obvious, significant impact of the recession. It is my view that the Commission has demonstrated an ability to weigh causes. I was present when the Commission dealt with the automobile case. The Commissioners worried and discussed the case for literally 1½ or 2 months. They weighed causes. They came out negatively in that case.

A third recommendation which has been made by some is to accelerate the period of the investigation. There have been suggestions that the 6-month period allowed the Commission for conducting an investigation be reduced. The chairman and the staff recommend that the committee not reduce the time period.

I have included a schedule of events which illustrates the extreme difficulty in finding the exact area in which we would get our work done.

[The schedule referred to follows:]

APPROXIMATE WORK SCHEDULES FOR 201 INVESTIGATIONS

1 to 3 weeks—Institution: Receipt of petition/review for adequacy; staff recommendation/Commission institution; work schedule prepared; public notice issued.

4 to 10 weeks—Research/data collection: Report outline prepared; questionnaires prepared/reviewed/field-tested/mailed; data from returned questionnaires tabulated; data collected from other sources (trade associations; Government or private organizations, etc.).

11 to 18 weeks—Hearing: Prehearing report prepared/reviewed/submitted to Commissioners; non-confidential tabular data or text released to public; briefs submitted by parties; hearing held.

19 to 22 weeks—Staff report/related documents: Text of report prepared/reviewed/submitted to Commissioners; discussion of remedy alternatives prepared/reviewed/submitted to Commissioners.

23 weeks—Briefing and vote (normally separate for remedy considerations if injury determination is affirmative).

24 to 26 weeks—Report to the President: Commissioners' opinions prepared/transmitted to the President with confidential version of the report; non-confidential version of report published.

Mr. ERVIN. Recently the Commission has completed 201 investigations in an average of 5 months. However, where the complexities of an investigation made that impractical, the full statutory time limit was used. This occurred where there were imports of several different products from many different countries as in the recent specialty steel case and where the problems associated with remedy required a separate hearing and, in fact, a separate study.

The current law requires that the Commission make a remedy recommendation to the President. To be effective, the recommendation must be well-reasoned and complete. The staff assigned to review the Commission's work for the trade policy committee examines the Commission's record carefully. Apparent omissions or inadequacies can be used to alter or void the Commission's recommendation within the executive process. Were the Commission to lose any significant time, such a law would have adverse impact on the scope and quality of our work product and as a result would make us even less effective in getting affirmative action.

Criticisms and proposals relating to the development of an adjustment plan.

There have been a number of proposals within the administration and within the Congress that as a condition for obtaining import relief, an industry adjustment plan be prepared and agreed to by labor, management, and the Government. In recent years the Commission has obtained information on industry adjustment plans in accordance with section 201(b)(5). There is no legal requirement that an industry develop a plan as a condition to seeking relief. Such a requirement has at least two major problems:

(*a*) It would be an added burden on the petitioners requiring time and money for completion.

(*b*) Any such plan would tend to be static rather than dynamic. It would normally represent a compromise between the interests of different companies on what they would do were relief granted despite major differences between firms and the fact that no one knows what the final relief will be. The 201 process requires 6 to 9 months. During this period there are likely to be major changes in the economies, financial changes, or market-condition changes that invalidate the plan. Yet, since this would be the only "plan" in existence, it would take on a life of its own, quite independent of the real needs and realities of the industry at the moment that relief became effective. Any provisions requiring such a plan precedent to an affirmative finding should be carefully designed to insure the minimum burden and maximum flexibility for changing circumstances.

I have been requested to comment as well on section 406. Section 406 was designed primarily to deal with what was perceived to be the probable threat of manufactured goods coming from nonmarket economies. Since 1974 there have been only nine cases. There were two affirmative determinations, one split determination, and six negative determinations. In both affirmative cases, the President denied relief. Therefore, to date no industry has received relief from market disruption through the use of section 406. The Commission has no current cases under this section.

It is possible that industries have preferred to use the antidumping statute rather than section 406. Mr. Horlick and others have testified on the difficulty of using "countries under a similar stage of development" for purposes of calculating the cost of production under the dumping statute. The results of gathering information this way can be so capricious as to effectively discourage East-West trade in manufactured articles. In effect, without realizing it, we in the U.S. trade community are creating a major barrier to trade with nonmarket economies, because we do not have a law which currently can be administered to deal with unfair trade practice or trade practice which essentially relates to escape clause provisions. I would personally hope that section 406 could be rediscovered by the trade bar and that the President would follow a higher percentage of the Commission's recommendations.

Chairman GIBBONS. We will stop and ask questions here.

There are no cases pending under section 201?

Mr. ERVIN. None.

Chairman GIBBONS. This is primarily attributed to the fact that there has been no affirmative remedy ever granted by the President?

Mr. ERVIN. That is not technically correct, sir. The President has granted an affirmative remedy in 10 of the 48 cases, and most recently in the case of motorcycles, the remedy was very close to that recommended by the Commission, although not identical, and the President does have an opportunity on specialty steel currently to make a decision because the Commission has made an affirmative finding and suggested a remedy.

It is simply that in the history, until recently, a very small percentage received a remedy, or the remedy was a minor remedy, or only a fraction of that posed by the Commission.

The results to petitioners were that they could not predict what would happen reasonably. It is hard enough to predict what the Commission will do, but now they have the compounding difficulties of predicting what the President would do, where he has exercised—has had a bias not to make an affirmative finding for reasons I outlined.

Chairman GIBBONS. Section 406, how could that statute be improved?

Mr. ERVIN. I don't know that it can, sir. To begin with, we have not faced a flood of manufactured goods from nonmarket economies, and as a result, it is not as active as we thought it might be.

But interestingly enough, if you look at the problem that administrating trade laws from the standpoint of the European Economic Community, their principal concern is for manufactured goods coming from nonmarket economies, and I envision the possibility still exists that the trade which currently is of such concern within Europe may shift to coming in the United States.

What form do trade disputes take, dumping or 406? Currently for reasons I have given, they take the dumping route. But we all admit that the problem of dumping is not the Commissioners' injury determination.

It is calculating a margin. Obviously, Mr. Horlick cannot go to the nonmarket countries and calculate cost of production. The law provides that he has to find a country at a similar stage of development, whatever that means, and find a cost of production in that country.

I have spent 11 years in the private sector. Nine to ten years of that period I spent on cost or production committees. Having access to all the inside records in almost every instance, I can certify that we did not know what it cost us to produce given items.

The eventual question is what could we get for the items, not what did it cost us to produce them. Mr. Horlick has been told by the Congress that he can figure out what the cost of production is in a synthetic country.

He has stated this is ridiculous. We all agree.

Chairman GIBBONS. Based upon your experience, how can we work ourselves out of that dilemma?

Mr. ERVIN. I wish the bar would find 406. I wish nonmarket economies could essentially be treated as market disruption cases, that the affirmative findings of the Commission in a sense could be adopted by the President without further comment.

Chairman GIBBONS. In other words, you would look at price——

Mr. ERVIN. I would look at market disruption primarily, rather than trying to calculate cost of production.

Chairman GIBBONS. In effect, you would look at injury and if there was injury, you would essentially come up with some kind of countervailing duty?

Mr. ERVIN. Yes, although the injury test has to be higher than it is for the countervailing duty and dumping statutes. Currently the word "significant" is in the statute. You could use a higher standard if the Commissioners' action were to be treated as final, such as serious.

The standard has to be higher than countervailing duty and dumping if this is to be effective.

Chairman GIBBONS. But as a practical matter, we haven't had a whole host of goods coming in from nonmarket economies?

Mr. Ervin. I think they are going to come. I see that from dumping cases that are currently before the Commission. I haven't tabulated them.

My judgment suggests we have 10 cases in the last 12 months. I don't know if that is accurate. We will correct that for the record.

But they are coming.

Chairman Gibbons. They are coming as dumping cases?

Mr. Ervin. Yes, sir.

Chairman Gibbons. I have thought seriously about taking those functions of the Department of Commerce that are roughly administered by Mr. Horlick, the unfair practice cases, and moving the whole thing over into your shop.

I am trying to remove them from—well, I hate to say political influence, because the political influence is such a nebulous term—but to make them a little more judicious. This is certainly no reflection upon Mr. Horlick, because I think he has done an excellent job, but I am just thinking about how we can improve administration of the trade laws entirely and how we can perhaps save time and money.

Could there be any savings of time and money if we just put that function over in ITC, the unfair trade practices?

Mr. Ervin. I don't know enough about the work——

Chairman Gibbons. I was thinking about the investigations that you have to carry on. They are not exactly symmetrical, but they are to some extent.

Mr. Ervin. The information, however, is in one instance domestic, and Mr. Horlick's task is to determine cost of production by gathering information abroad. They seem to be very different issues.

Chairman Gibbons. Well, are they really different issues? One is done abroad and one is done here. You are both trying to get economic information about one product line.

Wouldn't there be some cross-fertilization or synergistic action from perhaps the same person or a group of persons trying to work on a problem looking at it from the domestic angle and from the foreign angle?

Mr. Ervin. The closest corollary is in the word "threat." The statute provides for the Commission to determine whether there is present injury or threat thereof. The courts say the threat must be immediate and serious.

Everyone is threatened, otherwise they wouldn't bring the cases and spend all this money. The payoff of this kind of connection, I suppose, would be in giving the Commission greater access to the information necessary to really deal with the question of whether or not there are radical changes occurring in the foreign production or costs of production or availability of production or capacity utilization which would directly lead to threat determinations.

We now have difficulty in gathering that information. In terms of time, from what I heard in Mr. Horlick's testimomy, I am not certain that we could do it any faster than he.

I don't know this, because I am not an expert in his methodology; anyway to do it cheaper. As a result, I am not sure that if such a transfer were made we would do it cheaper or better, which would be the primary motive for making such a change.

As to political influence, the Commission has insulation from political direction from the State Department or the President. Mr. Horlick stated that he has never been directed to do anything either.

One of his greatest defenses is that were such a structure to be given, he can be hauled into court as can his subordinates and be asked the question, "Were you told what to do?" If they were told to do something by someone, that court will reverse it.

There are active interests who are seeking to determine the reasons for making decisions in his area, and I believe the primary protection against political control is the court review.

Chairman **Gibbons**. That is a good point.

Don?

Mr. **Pease**. Thank you, Mr. Chairman. Thank you, Mr. Ervin, for excellent testimony.

Could you review the impact of section 201 decisions on other industries and the history of favorable decisions by the Commission and the President?

Mr. **Ervin**. Yes, sir. Under article 19 of the GATT, nations which have an affirmative finding by the Commission and by the President restricting imports by quotas or tariffs or tariff rate quotas have a right to demand compensation of an equal amount without retaliation by the United States against American exports.

These are in industries unrelated to the dispute, and this is a difficult and painful process. It means that in giving a grant of relief to one domestic industry, you are taking away the right of a free trade or free access to another industry without the rights of retaliation.

This is such a painful process that we have invented a new phrase called "orderly marketing agreements." The concept is that voluntarily nations are going to cooperate with us who will never get into this business by limiting their exports to more or less the numbers that have been laid out by the President.

Well, the current term, "orderly marketing agreement," is a general term and voluntarily granting of this orderly marketing agreement is obviously a term of art. It is a device to avoid compensation, but that is essentially the process.

Mr. **Pease**. In the 10 cases where some relief has been granted by the President under section 201, has there ever been recourse to article 19 of the GATT?

Mr. **Ervin**. I am sure there has, although I don't have a list of it. I personally do not deal with this.

Bill Krist and USTR do, and may well be able to comment on that. It is by pure chance that we happen to have at the Commission someone who has been with the trade business for 40 years and has been making calculations on compensation agreements during that period, Bill Hart, and probably is the leading expert within the Government on that question. He is loaned to USTR when this issue comes up.

Mr. **Pease**. I hope later somebody can comment on that. I would be curious to know what impact there might have been in some specific case.

You mentioned that the pattern of the President in granting relief where recommended by the Commission has changed somewhat—that in the late seventies the President more often went along with the Commission, and since 1980, less often.

The difference between those two periods is the recession to which you alluded. Another difference is the President.

Out of the 10 cases in which relief was granted, are there figures as to which ones were under the jurisdiction of, say, President Ford, or President Carter, or President Reagan?

Mr. ERVIN. I could develop them. I do not. I perhaps did not make clear what I perceived had happened.

I would like to correct the record. The pattern of denial of affirmative findings by the Commission was general. This President has had, as I recall it, only three or four cases and it began with the negative finding in automobiles. After 1 month in office, President Reagan decided that despite the advice of the Commission's negative finding on automobiles to seek an orderly marketing agreement from Japan or something which is something like an orderly—a voluntary restraint.

The other cases which he has received so far were motorcycles, which he acted affirmatively on. So I think at this point he has had very few cases.

The bar was, however, I think reacting to the whole process which had been administered by Presidents Ford, Carter, and obviously now Reagan, and felt that this process was likely to continue, that the administration would be reluctant for reasons I have given to go through the problem of affirmative findings.

There would be strong reasons not to use section 201. Applicants sought to get out of the political channel where they had trade disputes and take disputes that really were perhaps best found in 201 and put them into countervailing duty and dumping.

I offer as illustration the steel dispute. The act requires that the Commission determine an industry in the United States. There are 100,000 different items of imports in the United States.

Technically speaking, you could argue, although we did not, that there are 100,000 different industries if each product were to be defined as an industry.

That whole dispute was settled when the industry withdrew its petitions in a fashion that arguably looks like a 201, even though it was all filed and prosecuted under countervaiilng duty and dumping.

The domestic content legislation now before the Congress in a sense is a kind of 201 case. The pressures that relate to 201 continue. They go under other directions. They find other forums.

Mr. PEASE. If the ITC recommends relief and if the President grants the relief, and if the foreign government affected takes advantage of article 19 of the GATT, who makes the determination of which U.S. industry suffers as a result?

Mr. ERVIN. The President, again. He gets all the bad jobs.

Mr. PEASE. Would the President be free to spread that pain quite widely across American industry?

Mr. ERVIN. Yes. Or concentrate it. It fortunately hasn't happened often enough, but the authority to conduct it is there. There is no oversight.

Mr. PEASE. It seems to me that there is a rationale for that procedure. If an industry is being really hurt by an influx of imports for whatever reason, that single industry can suffer a great deal, and if the cost of providing relief to that industry is spread widely enough among other industries, it would hardly create a ripple.

Let me ask you, if Congress were to take away the President's discretion in 201 cases and require that the decision of the ITC is final, at that point do you think the ITC also ought to have the responsibility of determining who suffers the pain under an article 19 finding?

Mr. **Ervin**. Well, I began by saying that the Commission and staff have taken no position regarding the first question of whether that authority should be given to the Commission. I have given no thought to the second question.

We do supply technical advice through the history and experience of one man in the U.S. Government who has dealt with this, Bill Hart, and certainly as long as he remains, the Government would continue to do so.

As to the advice of the Commission as a corporate body on what should be done, I have no opinion at this moment.

Mr. **Pease**. If the Congress were to attempt to override the President's action in a 201 case, what are the options of Congress? Can Congress provide a substitute remedy? Or is Congress limited to vetoing what the President has done, which then leaves nothing?

Mr. **Ervin**. No. The effect of the override would be for the Congress to be left with the Commission's recommendation as given.

Mr. **Pease**. So if the Congress overrides the President, the remedy is what the ITC recommended?

Mr. **Ervin**. Yes, sir.

Mr. **Pease**. That is good. Can you tell me how the European Community handles large volumes of imports from nonmarket countries? You said the European Community is more worried about that than we are right now.

How do they deal with those sudden influxes of imports from nonmarket countries? What is their mechanism?

Mr. **Ervin**. I should know the answer to that, but I don't. I shouldn't give you my impression, because it is an uninformed impression.

Therefore, I can give you no more information.

Mr. **Pease**. Perhaps we can have our staff check that out or if you find out, I would be happy to know.

That is all, Mr. Chairman. Thank you very much.

Chairman **Gibbons**. Mr. Krist.

STATEMENT OF WILLIAM KRIST, ASSISTANT U.S. TRADE REPRESENTATIVE FOR INDUSTRIAL TRADE POLICY

Mr. **Krist**. I appreciate very much the opportunity to testify this morning on section 201, the import relief statute.

In accordance with your request at the beginning of these hearings, I will submit my written statement for the record and make a brief oral summary.

Chairman **Gibbons**. Your statement will be included in the record in its entirety.

Mr. **Krist**. Thank you, Mr. Chairman.

As you know, the administration is strongly committed to the concept of a free and open trading system. In our judgment, this system has benefitted the U.S. exports and it has helped U.S. consuming interests, and it has given domestic U.S. industry incentives to be as competitive as possible.

However, both the international trade rules and the U.S. trade law that set out the principles of this system allow for temporary import relief.

The purpose of such relief is to give an industry a short breather in which it can adjust to international competition, either by upgrading its own competitiveness or by gradually phasing out.

However, providing temporary relief has significant costs to our economy. It can raise prices to consumers.

In the case of intermediate products, it can raise the costs of important input products to other industries, thereby reducing their competitiveness.

Because of our international obligations, as has been mentioned, it can result in the need to provide compensation or for the United States to accept foreign retaliation. It can take the pressure off the industry to do all that it can do on its own to become competitive internationally.

For these reasons, both U.S. law and the GATT provide stringent tests for the granting of temporary relief under fair competition. We must find that imports are or threaten to be a substantial cause of serious injury. Then the President has to determine that granting temporary relief is in the national economic interest.

Because of these costs to our economy and to other commercial interests, such a stringent process and procedure for granting temporary relief from fair competition is appropriate.

Because of these costs, on cases where the ITC has found injury, we have been meeting with the industry to determine how they would use relief to adjust to international competition if the President were to grant relief.

Of particular interest to us in these meetings with industry are such issues as whether or not import relief is an effective means to promote adjustment, whether or not other factors such as Government programs also affect the industry's competitiveness, whether or not industry adjustment plans or efforts that are already underway are likely to be effective, and whether or not relief would be likely to encourage additional productive capacity in the industry that might not be economic over the long run when relief is terminated.

In several recent cases we have asked the ITC to conduct interim reviews of the effectiveness of relief to insure that the industry is taking measures to increase its competitiveness when the President has decided to grant relief.

As you know, several proposals are being advanced for amending the 201 statute. For example, it is sometimes suggested that the time period for 201 decisions could be shortened. We don't agree with that.

We would agree that the ITC is currently making all the efforts that it can make to expedite its decisions whenever possible. Similarly, the 60 days given to the President for his decision represents a very tight time frame.

Attached to my written testimony is a flow chart that sets out exactly what we do in the administration on each of the 60 calendar days that we have for making our determination. As you can see, there is no fat in that time frame.

Further, as we try to consider more and more how the industry would plan to use relief if it is granted to adjust to international competition, this time frame is even tighter.

Another proposal that we strongly oppose is that the President's discretion in imposing relief be reduced. As I have noted, temporary relief has costs to our economy and to other industries.

These costs have to be balanced in making the decision on the overall national economic interest, and we believe the President is in the best position to balance the costs and benefits in this decision process.

In considering proposals for changing the import relief statute, it is important to remember that what practices we adopt here in this country may well be emulated by other countries.

If we make it too easy to obtain temporary import relief, other countries will do the same, thereby jeopardizing our important export interests. We have to approach this issue with these broad global interests in mind in looking at how we can best administer the statute.

We look forward to working with the committee and your staff to examine any ideas for improvement that you may have.

That is the end of my statement. I will be happy to answer any questions that I can.

[The prepared statement follows:]

STATEMENT OF WILLIAM K. KRIST, ASSISTANT U.S. TRADE REPRESENTATIVE FOR INDUSTRIAL TRADE POLICY

I appreciate the opportunity to be with you today to elaborate on the Administration's views toward Section 201 of the Trade Act of 1974, popularly known as import relief.

A basic Administration philosophy is to promote free, but fair, international trade. This stimulates competition between the United States and foreign nations, thereby allocating our national resources to the most efficient lines of production. Consumers benefit through lower prices and a greater selection of goods in the marketplace, and inflationary price increases are restrained. Economic growth and full employment are fostered through expanded export markets for U.S. goods and services.

Consistent with this philosophy, it is appropriate in some cases to provide temporary relief to an industry that has been injured by fair import competition. Import relief can facilitate an orderly adjustment by the industry to import competition, either through modernization of facilities and more efficient use of industry resources, or through a gradual contraction in the size of the industry.

The granting of temporary relief to permit adjustment to import competition is an established principle in both U.S. and international law. Under international law, Article XIX of the GATT is the recognized basis for temporary import relief. As this Committee well knows, many countries feel that the current Article XIX procedures should be updated. At last fall's GATT Ministerial meeting, Ministers agreed that work on a code to update Article XIX should be accelerated, an interim report on this work prepared in July, and a new text agreed to by early this coming November. In spite of this impetus, little progress has been made in recent months; however, we are hopeful that some new thinking is going on in capitals, and that serious negotiations on updated import relief procedures will begin in the near future.

Section 201 of the Trade Act of 1974, the so-called escape clause, is the appropriate vehicle in U.S. law for granting temporary relief, and is our domestic equivalent to Article XIX. Under this statute, relief is limited by law to no more than five years with a possibility of one three year extension. To date, in this Administration there have been four petitions for relief under section 201. Of these, the U.S. International Trade Commission

(ITC) found affirmatively two cases--motorcycles, and specialty steel; the Administration granted relief for motorcycles, and is presently considering the specialty steel case. Further, the issue of extension or continuation of relief was addressed in the cases of non-rubber footwear, fasteners, procelain-on-steel cookware, clothespins, high carbon ferrochrome, and mushrooms; relief was continued for certain mushrooms, porcelain-on-steel cookware, high carbon ferrochrome, and clothespins.

In structuring a mechanism for import relief, the Congress established a logical two step process for arriving at determinations. This process provides the necessary balance between the two essential, but different, questions that must be resolved--has the petitioning industry been injured, and if so, is it in the national economic interest for relief to be granted?

The ITC, an independent fact finding entity, focuses primarily on case specifics as they relate to injury. The President, assisted by the interagency deliberative system, must consider the broader national interest implications of granting relief and design of an appropriate remedy package. We believe that this two step system has served the country well.

It is critical in arriving at Presidential determinations on whether to provide temporary relief from imports that the economic interests of the particular petitioning industry be carefully balanced against overall national economic interests. As a rule, numerous national interest questions must be addressed. Import relief can result in higher prices to U.S. consumers. Where the product in question is a raw material or industrial input, consuming U.S. industries, as well as ultimate U.S. consumers, may confront higher prices. Where the result of relief is higher prices as well as scarcity, demand patterns of ultimate purchasers may change due to substitution, which can threaten intermediate industries. GATT Article XIX provides a procedure for the rebalancing of trade concessions. Normally, this means that compensation is provided by temporarily lowering the tariff level on a different product, or products, which can create a competitive problem for the U.S. industry producing the product on which the compensation is paid. The economic and social costs that would be incurred by taxpayers, communities, and workers if import relief were or were not to be provided must also be identified.

These costs from temporary import relief can be significant, as is shown in the recent decision on motorcycles in which the President basically accepted the ITC proposed remedy of a 45 percent duty increase in the first year of relief, declining to 10 percent in the fifth year. The ITC proposed this remedy as critically necessary to deal with the large inventory overhang of imported motorcycles in the United States, which was the reason for the ITC threat of injury finding. Addressing this overhang is important to allow the domestic industry an opportunity to regain competitiveness and maintain employment. However, the ITC noted that this proposed remedy would likely increase the cost of imported motorcycles by 10 percent the first year, and 12 percent the second.

Since there are costs associated with the granting of import relief, it is important that the effectiveness of any proposed relief be examined carefully. As a consequence, the Administration's policy is to meet with petitioning industries to learn how they would use relief to adjust to world competition. Of particular interest here are such issues as: Is import relief an effective means to promote adjustment? Do other factors, such as Government programs, also affect the industry' competitiveness? Are industry adjustment plans or efforts already underway likely to be effective? Can the industry obtain the financing and expertise needed to fully implement its plans? What adjustment steps has the industry already taken that display "good faith" intentions? Is relief likely to encourage additional productive capacity that will not be economic over the long-run? A related question is whether relief should be for the purpose of providing a temporary "breather" to an industry that has to gradually contract because of world competitive conditions, or to allow an industry to modernize its facilities?

Two recent cases serve to illustrate the relative importance placed on adjustment efforts. In the case of porcelain-on-steel cookware, a one firm industry, a provision for a two year ITC interim review of the effectiveness of relief was included when four years of relief was originally granted in 1979. At that time, it was stated that relief would be continued for the full term only if the domestic industry made reasonable efforts to adjust to import competition. The ITC, in its interim review, concluded that, while the U.S. firm had not completed one of the major projects it had planned before relief was granted, it had made reasonable efforts. Consequently, this Administration decided to continue relief. The signal we wanted to send the private sector was that relief is reliable even with a change of Administrations--and that private investment decisions can be made on the basis of relief.

In the one section 201 case referred to us by the ITC--motorcycles--we considered industry adjustment plans extensively in the decision process. Harley-Davidson demonstrated a strategy to regain competitiveness, and is in the process of implementing it. For example, they have reduced their costs to the extent that their breakeven sales level dropped from 50,000 units to 32,000 units. We expect them to continue all reasonable efforts to become competitive, and particularly to make all reasonable efforts to reduce costs and improve quality so that they can be competitive when relief is terminated. In this case, we will also ask the ITC to conduct an interim review of the effectiveness of relief. In future cases, we may also ask the ITC to conduct interim reviews.

The statute requires that imports be a substantial cause of injury; by this definition, an industry may have other factors limiting its ability to compete. In some cases, temporary relief could exacerbate these problems, unless firms in the industry plan to address these problems constructiviely during the relief period. For example, import relief granted to an industry may temporarily increase industry profitability, thereby encouraging wage and investment levels that would be inappropriate in the absence of relief.

Several proposals for amending the current Section 201 statute are being proposed that appear to us to present serious problems. For example, it is sometimes suggested that the time period for considering 201 relief cases can be shortened. We believe the ITC timeframe is tight, and that the Commission is currently making all efforts to expedite its determinations whenever possible. Similarly, the 60 days provided to the President to reach his determination on an import relief case is extremely tight. In practice, the bulk of this 60 day timeframe is consumed by Executive Branch interagency deliberations over the national interest criteria, and in interagency decision making through the Trade Policy Committee mechanism on recommendations or options to present to the President.

We have attempted to streamline and standardize this process as much as possible so as to make the most efficient use of the limited time available. Nonetheless, the 60-day period is very tight as the attached flow chart shows. As we continue to emphasize the issue of how the domestic industry would use the relief period, the 60 day timeframe becomes even tighter.

Another proposal that we strongly oppose is that the President's discretion in such cases should be reduced. Under the statute, the President is required to consider the national economic interest. This is a critical determination--and one that can only be made by the President. As I have noted, import relief has substantial costs to the economy and raises complex issues. To pretend that these complexities do not need to be considered would undermine the international trading system and our broader economic objectives.

Let me give one example of the importance of Presidential discretion. In the motorcycle case, the ITC had recommended an across the board 45 percent tariff increase on all heavyweight motorcycles. However, this would have removed from the U.S. market certain suppliers, such as BMW's sales of under 3,000 units, which are produced in West Berlin. In the final remedy decision, the President provided an exempted quota to deal with this problem.

A study is underway of ways to improve our administration of the import relief program. At this time, we believe the present 201 statute is adequate to enable us to effectively provide temporary import relief in those circumstances where it is appropriate. Were the Congress to open up this statute in the current recessionary climate, we are concerned that the end result might well be a statute that is not in our long-run national economic interest. We look forward to working with this Subcommittee to examine any ideas for improvement that members may have.

TIME FRAME FOR ACTION--THE 60 CALENDAR DAYS OF AN ESCAPE CLAUSE CASE

Action	DAYS -2	0	2	4	6	8	10	12	14	16	18	20	22	24	26	28	30	32	34	36
USITC makes injury finding																				
Task Force chairman designated by USTR.	XX																			
Chairman requests notice to TPSC establishing a Task Force.	XX																			
After USITC remedy decided, send short memo to Ambassador.	XXX																			
USITC report sent to President.		XX																		
Report sent to TPSC members; first Task Force meeting scheduled.		XXXXXX																		
USTR lawyers requested to send out Federal Register notice, 30-day comment period.		XXXXXX																		
First Task Force meeting held, work assigned, deadlines discussed.				XX																
Drafts of background and 202(c) completed, circulated, discussed, and typed.				XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX																
Options Paper written, typed, circulated, reviewed, retyped, etc.										XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX										

TIME FRAME FOR ACTION--THE 60 CALENDAR DAYS OF AN ESCAPE CLAUSE CASE

tion	DAYS 26	28	30	32	34	36	38	40	42	44	46	48	50	52	54	56	58	60
J. Completed draft circulated to Task Force for final correction, no recommendation included.			XXX															
K. Task Force draft circulated to Executive Committee and Ambassadors.	XXX																	
L. Task Force Chairman's briefing of Executive Committee and Ambassadors.	XXXXXX																	
M. Hold meetings for industry, labor, and Congressional leaders and affected foreign governments with Ambassadors.		XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX																
N. USTR approach developed.	XXXXXXXXXXXXXXXXXXXX																	
O. TPSC paper sent out with recommendation.				XXX														
P. TPSC, TPRG, TPC, CCCT review to develop consensus recommendation if possible.				XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX														
Q. Preparation of papers to go to White House begins.							XXX											
R. Presidential decision memo reflecting consensus or different options written and cleared within USTR.									XXXXXXXXXXXXXXXXXXXXXXXXX									

TIME FRAME FOR ACTION--THE 60 CALENDAR DAYS OF AN ESCAPE CLAUSE CASE

ction	DAYS 26	28	30	32	34	36	38	40	42	44	46	48	50	52	54	56	58	60
S. 15 sets of documents prepared. 10 sent to White House.													XXX					
T. Arrange for White House to contact us when decision is made.												XXXXXXXX						
U. When decision made, USTR first calls Congressional leaders then industry/labor representatives and foreign government representatives.																		XXX
V. As soon as this is done, press release prepared earlier is sent out.																		XXXXXXXXXXXXXXX--->
W. If decision affirmative, 15 days to prepare notice putting action into effect. At this point in time legal language is drafted with help of USITC and Customs.																		XXXXXXXXXXXXXXX--->
X. Summary of TPSC paper transmitted to appropriate Congressional Committees (for Sec. 201 cases only).																		XXXXXXXXXXXXXXX--->

Chairman GIBBONS. What has been the most common reason or set of reasons for denying relief when the ITC has found injury?

Mr. KRIST. There is a range of issues that we look at in making the national economic interest determination. One of the key factors is whether or not relief would help the industry become competitive or might hinder its efforts to become competitive by giving it artificial incentive to invest a great deal more in unproductive capacity or raise wage rates above what the competitive market would normally dictate.

We also look at the consumer costs and costs to other industries from relief. I would say that those are the major elements that we look at and that the compensation issue would be a bit further down the list.

Chairman GIBBONS. Mr. Krist, I sometimes get the impression that some agencies of the administration don't want these programs to work anyway, and they drag their feet and fail to live up to the challenge that the law lays down for them.

I realize that USTR is the head of an interagency committee to make these things work. What is USTR looking at to improve the interagency work in this area?

Mr. KRIST. Well, I think there has been a lot of arguments that different agencies come into these cases with their minds made up in advance. The GAO did a review of the 201 process. I think it was about 2½, 3 years ago now, and one of the issues that we looked at in that report was exactly that question.

I think I would personally very much agree with the GAO's conclusion. They felt that different agencies had different biases in this process, but that having to discuss all the aspects of the national economic interest, was a useful process.

I don't think that the agencies come at this process inflexibly. In fact, on an awful lot of the cases we have a consensus recommendation that goes forward. I think that they do come at it with an open mind, but the agencies do have their particular frame of reference that they tend to look at these cases from.

Chairman GIBBONS. Does the USTR have any time table as to when we may be able to see what is a better coordinated action in the executive branch in these kinds of cases?

Mr. KRIST. Well, we have spent a great deal of time and effort over the past year to try to assess how to best administer the statute. I think that the element that we have been looking at the most is the question of how the domestic industry would use relief to adjust and to become more competitive.

We have made some modifications in our procedures as a result of that review. We have come to the conclusion, I think, that that is a very important issue. I would agree with Mr. Ervin's point on that.

We have been meeting with the industry to hear how they would use relief, which I think is important because in the absence of that there is a tendency to think that they would always use relief poorly.

We have been doing a great deal more of the requests of the ITC to do interim reviews of the effectiveness of relief. On the specialty steel case that is pending before us right now, we are trying to take this a step further.

We have had a meeting with outside experts of the steel industry who don't have any ax to grind in that case to get their assessment of the problems that are faced by the specialty steel industry.

We have been meeting with the consuming industries who would be affected by any import relief case, and we will be meeting with the labor people and the industry to talk with them about how they would use the relief.

I think that we would be very reluctant to take that process any further than a listening process and reviewing how the industry would use relief. I would have a lot of skepticism about our ability to really make judgments on an industry.

We are looking at the other proposals that have been put forward on import relief, such as reducing the costs of a petition, fast track proposals for perishable goods, that sort of thing.

We are, in fact, going to be meeting this afternoon with our industry advisory committees to ask them these kinds of questions, and we are looking at any other potential steps that we can take to improve the process.

Chairman GIBBONS. Don?

Mr. PEASE. Thank you, Mr. Chairman.

Mr. Krist, I am glad to hear that you are looking at industry adjustment plans. I think it is important to ask the industry what it is going to do to help itself before the Government is asked to provide relief in behalf of all taxpayers.

As I understand it, from your testimony, you go through that process as part of your recommendation to the President on whether to grant relief in 201 cases; is that correct?

Mr. KRIST. Yes, sir. That is right.

Mr. PEASE. You said that you would be opposed to limiting the President's discretion in these cases. I guess that is not surprising. You said it was important that the President be able to take into account macroeconomic considerations at the domestic level, cost to consumers, and so on, and also take into consideration the possibility of retaliation by other nations—I think you referred to them as global considerations.

I guess one of the things that concerns people who have talked with me about the decisionmaking process within the Administration is the feeling that decisions are often heavily influenced by general foreign policy considerations not related to trade.

We are trying to get country A or country B to go along with something this government wants in a totally unrelated area of policymaking. We don't want to offend the country or upset the applecart so our executive branch sidesteps the granting of relief to the American industry that is provided in accordance with our trade remedy laws.

Is that a fair accusation?

Mr. KRIST. I don't think it is fair, certainly in the time that I have been involved in the 201 process. I haven't seen indications of that.

The statute and the congressional intent behind it, I think, is not to have foreign policy considerations affecting our decision process. One of the elements of the 201 process is that it is consistent with our international obligations.

It is the domestic equivalent of article 19 of the GATT, and as long as we follow the appropriate procedures in it and live up to our international obligations, I don't think that we have the same kinds of foreign policy problems that we have when Congress simply enacts some kind of a protectionist measure.

I think it is an internationally accepted procedure.

Mr. PEASE. It may be internationally accepted and may be consistent with the GATT, but I have had many discussions with Europeans over the last 4 or 5 years, and I know they think that any formal action at all by the U.S. Government is somehow not playing cricket.

They couldn't understand, as in the case of the steel complaints filed last year, how we could be so nasty as to file those complaints. I was really struck with the degree to which they seemed to think that it was just not fair of us to do that.

I kept asking them—it is in the law, our companies have a right to file complaints, the U.S. Government has an obligation to hear the complaints and to make a decision—what is wrong with following the law?

So I suspect that even though article 19 of the GATT clearly is consistent with section 201, our European allies in particular would prefer that some informal arrangement be worked out.

They love informal arrangements over there. Their way of resolving problems would pressure us to let foreign policy consideration enter into our decision. You are telling me that that does not occur?

Mr. KRIST. Well, I think that the steel case is inherently different from this process because the steel case arose out of a problem basically precipitated by European subsidies, and it was a different process than the temporary relief from fair trade.

I think that a good bit of the European comments along that line were posturing to try to put themselves in the best bargaining position that they could. I would be critical of the way that the Europeans tend to do these processes.

I think there is a lot to be said for the transparency of the U.S. system, and the fact that it is assured to be temporary, in the case of fair trade, or that it is pegged to the unfair practice in the case of the antidumping countervailing duty statutes. The European practices tend to make these kinds of measures permanent, and they end up with an industry that never regains competitiveness; it just continually has to come back for these kinds of protections. I certainly don't think that we would want to emulate that kind of approach.

Mr. PEASE. You put a good deal of emphasis in your testimony on the adjustment steps that an industry has already taken that display good faith intentions. Is that required in the statute?

Mr. KRIST. No, sir. It is not. The language of the statute sets out that we should look at how the industry would use relief, but it is not a requirement element.

I think that particularly a number of individuals in the labor movement would be very hesitant to make it a required element of the statute. Labor—under the current statute, can file a petition for import relief and would feel that if it were a requirement to have an adjustment plan, they wouldn't be able to do an adjustment plan and, therefore, would lose their rights under the statute.

Mr. PEASE. When you do consult with an industry, what evidence do you look for that you believe demonstrates good faith by that industry?

Mr. KRIST. Well, we would like to see that the industry had already made efforts, if possible. We would like to hear them tell us that they are really planning to address the kinds of issues that we think are real problems.

For example, in the case of the Harley-Davidson motorcycle case, Harley had taken measures to cut back their break-even point. They had reduced it before the petition by 40 percent in terms of how many units they had to produce to be competitive.

They had a plan of what they were going to do that was finished on the drawing board and was ready to be implemented in terms of engine redesign, a new size motorcycle, that sort of thing.

They had a specific problem in imports, namely, the enormous inventory overhang, and from that point of view, they had completed the drawing board process and had already implemented some of them, such as the break-even point.

Their wage rates were about the average manufacturing wage rate in the United States, and along those lines it looked to us like they had done what they reasonably could have done up to that point in time.

Mr. PEASE. It is a little off the point, but do I gather from your comments that you feel that Harley-Davidson will be competitive by the end of this 5 year period of protection?

Mr. KRIST. I don't think that the Government could begin to make that kind of a judgment. I would be very skeptical of our ability to predict whether an industry would be a winner or a loser.

I agree with the comment Mr. Ervin made: if there were adjustment plans we had to approve, they would tend to get locked into concrete. People's prestige would be committed whether or not the plan worked. I think it is up to Harley whether they are competitive or not.

Mr. PEASE. Do you do any analysis of how companies or industries have spent their discretionary funds, whether they have reinvested them in the industry or the company or whether they have bought companies in other industries?

Mr. KRIST. You asked the question of what we consider in relief, and the decision of whether to grant relief or not. Concern about exactly that sort of point has always been a major element.

That is why we are trying to meet with the industry much more now to make sure that if relief were to be granted that that sort of thing didn't happen, that it wasn't used at the expense of other industries and consumers, and not to make the industry regain its competitive health.

[The following question was subsequently submitted:]

Question. On Page 5 of William Krist's testimony, it says that government cannot make a decision as to whether or not a company can become competitive if relief is granted. Does this mean that the government won't judge future requests for federal assistance by an industry's previous use of assistance and its success in making itself competitive?

Answer. Government cannot ensure that a company or an industry becomes competitive as a result of import relief because government does not control key management decisions. For example, we have no control over a company's pricing practices, cost and quality control techniques, and marketing practices during a period of import relief. Yet these may be key to adjustment. But government is not qualified to make these decisions nor should it try to intervene in the free market process, which is more efficient.

Government can, however, request that companies in an industry petitioning for import relief develop adjustment strategies to improve their competitiveness during the relief period. In some cases, efforts being made to adjust might be periodically reviewed during the relief period. If a petitioning industry has previously benefitted from import relief, previous adjustment efforts and their impact on industry competitiveness would certainly be taken into account in determining whether to grant additional relief. If an industry declines to submit an adjustment plan, this would also be taken into account in deciding whether to provide relief.

Mr. **Pease**. If a steel company were to come to you and ask for relief and had recently invested $6 billion in an oil company, would that enter into your decision?

Mr. **Krist**. Well, first off, it wouldn't come to us and ask for relief, it would go to the ITC, and the ITC would have to establish that increased imports were a substantial cause of serious injury. The ITC, in making that judgment, would be looking at things like whether the industry had been taking reasonable efforts to stay competitive, whether it had been undertaking investment in research and development, that sort of thing.

I think that would probably be the key element in that process where industry practice would really enter in.

Mr. **Pease**. Finally, we have heard that section 201 is virtually not in use anymore. Apparently that is because the bar has the impression that there is very little chance of getting effective relief through that section. That has, I gather, led to a diversion into other sections of the code which are maybe less appropriate than section 201.

Does it concern you that the impression is widespread, that there is no reason even to try filing a section 201 case, you might as well try to shoehorn your concern into some other section of law that might produce a better result?

Mr. **Krist**. I think there are several elements to the answer to that. I think the first piece is that if an industry is faced with unfair competition, that their right remedy is an unfair trade remedy, that the tests for injury are lower on that and I think they should be lower. That really puts the burden on the country that is causing the problem. I think that is the right statute to use.

To the extent that an industry needs relief and wants relief from fair competition, it would concern me that they were going to other statutes and distorting those statutes toward this purpose.

I think that for the statute for import relief from fair trade, the criteria should be very stringent. I think they are, and I think it is appropriate that they are because it is an inherent contradiction in the free trade objectives that our policy is based on.

I think one of the reasons that there have been few petitions in recent years has been a feeling in industry that the ITC would rule that recession was a larger cause of injury than imports, and I think that has been an element of it.

Mr. **Pease**. Thank you very much.

Chairman **Gibbons**. Thank you.

Let us now go to the U.S. Department of Commerce, Mr. DeCain.

STATEMENT OF VINCENT DeCAIN, DEPUTY TO THE DEPUTY ASSISTANT SECRETARY FOR EXPORT ADMINISTRATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY LESLIE J. BARR, DIRECTOR, RESOURCE ASSESSMENT DIVISION, OFFICE OF INDUSTRIAL RESOURCE ADMINISTRATION

Mr. DeCain. Good morning, sir. I am accompanied today by Mrs. Leslie J. Barr, who is the director of our Resource Assessment Division of the Office of Industrial Resource Administration. That office is responsible for conducting investigations pursuant to section 232 of the Trade Expansion Act of 1962.

As you, Mr. Chairman and members of the committee, know, the purpose of the 232 investigation is to determine the effect on the national security of imports of any article. The objective of the statute is to protect the national security. Section 232 is not designed to insure fair trade or to protect a company or industry from import injury unless that injury is also a threat to the national security.

When imports do threaten the national security, adjustments of imports under section 232 is the means of eliminating the threat. Import relief is not an end in itself. The intent of a section 232 investigation is to safeguard the security of the Nation, not the economic welfare of a company or an industry.

To determine the effects on the national security of particular imports, the following criteria are used: Requirements of the direct defense, indirect defense, and essential civilian sectors; domestic production needed for projected national defense needs; capacity of domestic industries to meet projected national defense needs; existing and anticipated availability of labor and raw materials; growth requirements; and so forth, all of which are set forth.

On January 2, 1980, the Secretary of Commerce assumed responsibility for conducting section 232 investigations. Prior to this the Department of the Treasury had conducted such investigations. Before Treasury, the function had been performed by the Office of Emergency Preparedness and the Office of Emergency Planning.

Fourteen investigations have been conducted pursuant to section 232. Also, in 1959, one similar investigation was conducted. Four of these investigations have determined that imports threaten to impair the national security. All four of these positive findings pertain to oil imports.

Since 1980 the Department of Commerce has completed three investigations pursuant to section 232 and has updated one investigation completed by the Treasury Department in 1979. The updated investigation was one of the four investigations of oil imports that resulted in a positive finding. It was done in March 1982, and based on that investigation and finding, the President embargoed oil from Libya. Also in March 1982 the Secretary of Commerce found that imports of glass-lined chemical processing equipment did not threaten to impair the national security and sent his findings and recommendation that no action be taken pursuant to the investigation to the President. In August 1982 the Secretary sent his findings and recommendation to the President regarding the 232 investigation of ferroalloys. The President has not yet made a finding on that case—although he has moved to upgrade the national defense stockpile pursuant to that statute, and therefore I am unable to comment further on the findings and the recommendations pertaining to it.

Finally, our investigation of industrial fasteners completed in February of this year led to a finding that fastener imports are not threatening our national security.

With that as background I would be happy to answer any questions that you may have about section 232 and our administration of that statute.

Chairman GIBBONS. What are the time limits on a section 232 investigation?

Mr. DECAIN. The investigation must be completed within a year from the date of acceptance of the petition.

Chairman GIBBONS. Since you have not had much experience, do you have many people working in this area or who are prepared to work in this area?

Mr. DECAIN. Certainly, sir.

Chairman GIBBONS. How many?

Mr. DECAIN. The permanent staff is three, but we form an interagency task force to support our investigatory responsibilities.

Chairman GIBBONS. What is the latest action that was taken on oil? I realize that 232 is primarily, or has so far been an oil relief statute, an oil import quota statute.

Mr. DECAIN. The most recent action occurred in March of last year——

Chairman GIBBONS. That was on Libya. Any particular problems in administering this section?

Mr. DECAIN. No, sir. We have found that the instrument is an effective one and it seems to be operating well.

Chairman GIBBONS. Do you know from memory any of the cases that have been turned down recently? Maybe you have a list of them there.

Mr. DECAIN. By turned down you mean there was a negative finding?

Chairman GIBBONS. Yes.

Mr. DECAIN. The most recent case was the industrial fasteners case.

Chairman GIBBONS. Have you ever had one from the steel industry? I have a lot of steel people, particularly in the caucus, always coming to me and saying the steel industry is a national security industry.

Mr. DECAIN. Yes, sir, there was a case decided on May 7, 1971 involving miniature and instrument precision ball bearings.

Chairman GIBBONS. That is the last thing other than the nuts, bolts, and screws we have had in steel, is that right?

Mr. DECAIN. That appears to be the case. We can provide you with a listing of all the cases.

Chairman GIBBONS. If you would for the record. At the end of your testimony let us put in a listing of all the cases that have been filed in the last 13, 14 years, what action was taken, and describe the case briefly.

Mr. DECAIN. We can do that for you, sir.

Chairman GIBBONS. I guess we just do not have many national security problems other than oil; is that right?

Mr. DECAIN. To date——

Chairman GIBBONS. The reason why I ask this question, I hear all these dire complaints coming out of the Armed Services Committee that our whole industrial base is being destroyed and we cannot meet our national security requirements. I guess the Government could institute—you could self-initiate a national security case, can you not?

Mr. DECAIN. The Government can.

Chairman GIBBONS. The Defense Department has not wandered over recently, have they?

Mr. DECAIN. The Department of Defense initiated the industrial fasteners case. In that case, however, as you know, there was a negative finding that imports did not impair national security, and the Defense Department itself concurred in that finding.

Chairman GIBBONS. That is interesting, they started the case and then said we do not have a case. They looked at it a little closer, is that it?

Mr. DECAIN. No, sir. We all looked at it very closely.

Chairman GIBBONS. Well, that is interesting.

Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

What was the basis for the decision that the import of Libyan oil constituted a threat to our national security?

Mr. DECAIN. Well, sir, there had been an earlier investigation. The Department in the interagency process did not last year conduct a full-blow study. Rather it updated a 1979 Treasury investigation. It asked all the agencies to reaffirm their 1979 findings and asked the national security agencies to determine whether there were unstable sources of supply. Based on the update of the investigation in which all agencies except the council of economic advisers reaffirmed their 1979 findings, and the national security agencies found that Libya was a most unstable source of supply, a positive finding was made.

Mr. PEASE. Oh, I see. The idea is that if there is a national security situation we need to be able to get the oil for certain. If a supplying country may decide not to sell to us at any time, then that country is on the import prohibited list; is that correct?

Mr. DECAIN. Well, no, I would not characterize it that way, sir.

Mr. PEASE. Well, how would you characterize it?

Chairman GIBBONS. I should say in defense of the witness, that is not the most atrocious oil case. The first oil case was perhaps the most atrocious, the one that cost us thousands and billions of barrels of reserves and everything else by exhausting U.S. fields in order to prop up domstic oil prices. It was a national security case.

Mr. PEASE. Let me see if I understand it correctly. The Libyan case was decided on the basis of national security that Libya was an unstable source of supply; is that right?

Mr. DECAIN. No, sir. Let me defer to Leslie Barr.

Ms. BARR. In the Libyan oil case we went back to all the agencies who participated in the 1979 Treasury finding and asked them if they still concurred in their finding that imports of oil continue to constitute a threat to the national security. All of these agencies, with the exception of the Council of Economic Advisers, maintained their 1979 positions, which led to the finding in the 1979 Treasury study.

Mr. PEASE. The responsibility, though, lies with the Department of Commerce to make that finding, does it not?

Mr. DECAIN. To make the finding and recommendation.

Ms. BARR. We did not go back and do a 1-year study such as the Treasury Department did in 1979. It was not a 1-year investigation. What we did was update the 1979 Treasury investigation.

Mr. PEASE. Did you in the process of updating that investigation read it to find out what the rationale was in 1979?

Ms. BARR. In 1979 the rationale was that our dependence on foreign oil constituted a threat to national security.

Mr. PEASE. Specifically Libyan foreign oil?

Ms. BARR. There was not a finding with respect to Libya in terms of the finding. The finding was generic with respect to oil. The remedy that the President took with respect to the finding last year involved Libyan oil, and that remedy, I believe, was made on the basis of recommendations from the national security agencies. They stipulated that Libyan oil was a particularly unstable source of supply.

Mr. PEASE. I am relieved to find out that the Commerce Department made a generic finding that we were just importing too much oil; is that right?

Ms. BARR. Yes. We reaffirmed the 1979 Treasury finding.

Mr. PEASE. So the finding would apply to oil from Iran, or Iraq, or Saudi Arabia, or Mexico, or any place?

Ms. BARR. Yes, sir. The finding was that we were still too dependent on foreign sources of oil.

Mr. PEASE. That reassures me a good deal about the Commerce Department.

What is the definition of national security that you used? How big a war do we envision that we need to protect ourselves against?

Ms. BARR. It is a 3-year war.

Mr. PEASE. A 3-year war?

Ms. BARR. Yes, sir.

Mr. PEASE. I think the chairman said you could self-initiate cases. In the absence of actually self-initiating a case, do you look at various industries that might be affected if we had a 3-year war just as sort of a survey, an ongoing survey?

Ms. BARR. Yes, sir, but that is not the responsibility of my particular office. I believe that the Bureau of Industrial Economics [BIE] does that on a regular basis, that is looks generally at all U.S. industries, particularly critical industries.

Mr. PEASE. Do you happen to know whether any studies have been made in the case of the steel industry?

Ms. BARR. Yes, sir. There has just been a major study done on the steel industry.

Mr. PEASE. And the finding was that our present steel industry could handle the needs of a 3-year war?

Ms. BARR. Sir, I do not know whether they specifically addressed that question in the steel study. That would not have necessarily been an issue that would have been addressed by that unit.

Mr. Pease. Do I understand that your negative determination in the case of fasteners occurred because you felt there was an adequate foreign supply of fasteners?

Ms. Barr. No, sir.

Mr. DeCain. The basic conclusion that was reached there was that imports did not have an adverse effect on national security, and therefore no positive finding.

Mr. Pease. Imports now represent about 50 percent of the fastener use in our country, is that correct?

Mr. DeCain. Say that again, sir?

Mr. Pease. Do imports now represent about 50 percent currently of fastener——

Mr. DeCain. Yes, sir.

Mr. Pease. So your conclusion was that if we were involved in a 3-year war, that we could crank up our capacity to make up the 50 percent that was missing?

Mr. DeCain. No. The capacity that was looked at was the total mobilization requirement including direct defense needs, indirect defense needs, as well as essential civilian requirements. In the large that was met by the capacity of domestic production. We looked at imports to determine the extent to which the balance of those—of our requirement would be met, and concluded that in large measure they could be met by reliable imports.

Mr. Pease. Reliable imports coming from where?

Mr. DeCain. The Far East, principally Japan.

Mr. Pease. That is a long, long transportation route from Japan to the United States in the middle of a war.

My other question is probably beyond the scope of this hearing, but I am intrigued to know whether your assumptions about a 3-year war envision the use of nuclear weapons.

Mr. DeCain. You must understand that we did not devise the 3-year scenario. It is one that has been devised elsewhere and concurred in by the National Security Council and applied in all section 232 cases.

Mr. Pease. Well, is your assumption then that the domestic fastener manufacturing plants now in existence would continue to remain in existence in the process of a 3-year war?

Mr. DeCain. Yes, sir.

Mr. Pease. So in other words, you are assuming no nuclear weapons?

Mr. DeCain. Well, no——

Ms. Barr. Sir, the scenario that we use to do 232 cases, not only the industrial fastener case, but all 232 cases, is a scenario that envisions 1 year of mobilization and 3 years of war. There are other scenarios that are used for planning. There is a nuclear war scenario. It does not seem logical to anybody who works on the interagency task force that one would use that kind of a scenario to do this kind of an investigation.

Mr. Pease. I think that is a good answer. If there is a nuclear war you can forget about sections 232, 301, and 201 and everything else.

Thank you very much.

Chairman Gibbons. Well, none of this has any reflection upon you all. I hope you understand that. Apparently this is not a very widely used statute, although it is available for everybody and the Government can self-initiate cases. For some odd reason the only people that have used it very much and that have ever been very successful have been the oil companies. We had a wonderful policy, the best security policy was to use up all of our oil first, if that makes good sense to you. There is a real interesting story on that. Some time I will tell you about it. I think all the people that are involved in it are now dead. One of them died in an airplane crash with a suitcase full of money. Not under your administration. You all had nothing to do with that. This is ancient history, in the fifties. But we will go on. Thank you very much.

[The prepared statement of John A. Richards and material referred to follow:]

Statement of John A. Richards, Director, Office of Industrial Resource Administration, Department of Commerce

GOOD MORNING. I AM JOHN RICHARDS, DIRECTOR OF THE OFFICE OF INDUSTRIAL RESOURCE ADMINISTRATION AT THE DEPARTMENT OF COMMERCE. MY OFFICE IS RESPONSIBLE FOR CONDUCTING INVESTIGATIONS PURSUANT TO SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED.

AS YOU MR. CHAIRMAN AND THE MEMBERS OF THE COMMITTEE KNOW, THE PURPOSE OF A SECTION 232 INVESTIGATION IS TO DETERMINE THE EFFECT ON THE NATIONAL SECURITY OF IMPORTS OF ANY ARTICLE. THE OBJECTIVE OF THE STATUTE IS TO PROTECT THE NATIONAL SECURITY. SECTION 232 IS NOT DESIGNED TO ENSURE FAIR TRADE, OR TO PROTECT A COMPANY OR INDUSTRY FROM IMPORT INJURY - UNLESS OF COURSE THAT INJURY IS ALSO A THREAT TO THE NATIONAL SECURITY. WHEN IMPORTS DO THREATEN THE NATIONAL SECURITY, ADJUSTMENT OF IMPORTS UNDER SECTION 232 IS THE MEANS OF ELIMINATING THE THREAT; IMPORT RELIEF IS NOT AN END IN ITSELF.

THE INTENT OF A SECTION 232 INVESTIGATION IS TO SAFEGUARD THE SECURITY OF THE NATION, NOT THE ECONOMIC WELFARE OF A COMPANY OR AN INDUSTRY.

TO DETERMINE THE EFFECTS ON THE NATIONAL SECURITY OF PARTICULAR IMPORTS, THE FOLLOWING CRITERIA ARE USED:

(1) REQUIREMENTS OF THE DIRECT DEFENSE, INDIRECT DEFENSE AND ESSENTIAL CIVILIAN SECTORS;

(2) DOMESTIC PRODUCTION NEEDED FOR PROJECTED NATIONAL DEFENSE NEEDS;

(3) CAPACITY OF DOMESTIC INDUSTRIES TO MEET PROJECTED NATIONAL DEFENSE NEEDS;

(4) EXISTING AND ANTICIPATED AVAILABILITY OF LABOR (SKILLED AND UNSKILLED), RAW MATERIALS, PRODUCTS, PRODUCTION EQUIPMENT AND FACILITIES, AND OTHER SUPPLIES AND SERVICES ESSENTIAL TO THE NATIONAL DEFENSE;

(5) GROWTH REQUIREMENTS OF DOMESTIC INDUSTRIES TO MEET NATIONAL DEFENSE REQUIREMENTS;

(6) QUANTITY, QUALITY AND AVAILABILITY OF IMPORTS;

(7) IMPACT OF FOREIGN COMPETITION ON THE ECONOMIC WELFARE OF THE ESSENTIAL DOMESTIC INDUSTRY;

(8) SERIOUS EFFECTS OF IMPORTS ON THE POSSIBLE DISPLACEMENT OF DOMESTIC PRODUCTS, UNEMPLOYMENT, DECREASE IN REVENUES TO THE GOVERNMENT, LOSS OF INVESTMENTS, LOSS OF SPECIALIZED SKILLS AND LOSS OF PRODUCTIVE CAPACITY;

(9) ANY OTHER RELEVANT FACTORS THAT MAY WEAKEN OUR NATIONAL ECONOMY; AND

(10) OTHER FACTORS RELEVANT TO NATIONAL SECURITY IN LIGHT OF THE PECULIARITIES OF EACH CASE.

ON JANUARY 2, 1980 THE SECRETARY OF COMMERCE ASSUMED RESPONSIBILITY FOR CONDUCTING SECTION 232 INVESTIGATIONS. PRIOR TO THIS THE DEPARTMENT OF TREASURY CONDUCTED SUCH INVESTIGATIONS. BEFORE TREASURY, THE FUNCTION WAS PERFORMED BY THE OFFICE OF EMERGENCY PREPAREDNESS AND THE OFFICE OF EMERGENCY PLANNING.

FOURTEEN INVESTIGATIONS HAVE BEEN CONDUCTED PURSUANT TO SECTION 232 OF THE TRADE EXPANSION ACT OF 1962. ALSO, IN 1959 ONE SIMILAR INVESTIGATION WAS CONDUCTED. FOUR OF THESE INVESTIGATIONS HAVE DETERMINED THAT IMPORTS THREATEN TO IMPAIR THE NATIONAL SECURITY. ALL FOUR OF THESE POSITIVE FINDINGS PERTAINED TO OIL IMPORTS.

Since 1980, the Department of Commerce has completed three investigations pursuant to Section 232 and has updated one investigation completed by the Treasury Department in 1979. The updated investigation was one of the four investigations of oil imports that resulted in a positive finding. It was done in March 1982, and based on that investigation and finding the President embargoed oil from Libya.

Also in March 1982, the Secretary of Commerce found that imports of glass-lined chemical processing equipment did not threaten to impair the national security and sent his finding and recommendation that no action be taken pursuant to the investigation to the President. In August of 1982 the Secretary sent his finding and recommendation to the President regarding the 232 investigation of ferroalloys. The President has not yet acted on that case, and therefore I am unable to comment on the finding and recommendations. Finally, our investigation of industrial fasteners, completed in February of this year, led to a finding that fastener imports are not threatening our national security.

With that background, I would be happy to answer any questions you may have about Section 232 and our administration of that statute.

SUMMARY OF INVESTIGATIONS CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, 1962-1983

Adminstering Authority: Director of Office of Emergency Planning/ Preparedness, 1962-1973

Industry	Initiator	Date of Action & Status	Federal Register Reference
Manganese and Chromium Ferroalloys and Electrolytic Manganese and Chromium Metals	Manufacturing Chemists Association, Inc., Washington, D.C.	Petition filed May 20, 1963. Report on investigation made public July 17, 1964. Concluded that imports did not threaten to impair the national security.	29 FR 11484 August 8, 1964
Tungsten Mill Products	General Electric Co., Nela Park Cleveland, Ohio	Petition filed January 2, 1964. Report on investigation made public September 23, 1965. Concluded that imports did not threaten to impair the national security.	30 FR 12433 September 29, 1965
Anti-Friction Bearings and Parts	Anti-Friction Bearing Manufacturers Assoc., New York, New York	Petition filed October 16, 1964. Investigation terminated on November 2, 1966, at petitioner's request.	29 FR 14553 October 23, 1964 31 FR 14470 November 10, 1966
Watches, Movements and Parts	Presidential Request	Initiated April 2, 1965. Report on investigation made public on January 11, 1967. Concluded that imports did not threaten to impair the national security.	30 FR 4598 April 8, 1965 32 FR 588 January 18, 1967

Industry	Initiator	Date of Action & Status	Federal Register Reference
Chromium, Manganese and Silicon Ferroalloys and Refined Metals	Committee of Producers of Ferro-alloys and Related Products	Petition filed May 24, 1968. Report on investigation made public on August 14, 1970. Concluded that imports did not threaten to impair the national security.	33 FR 8518 June 8, 1968 35 FR 13037 August 15, 1970
Miniature and Instrument Precision Ball Bearings	Anti-Friction Bearing Manufacturers Association, New York New York	Petition filed January 31, 1969. Report on investigation made public on May 5, 1971. Concluded that imports did not threaten to impair the national security.	34 FR 2162 February 13, 1969 34 FR 7884 May 17, 1969 36 FR 8537 May 7, 1971
EHV Power Circuit Breakers and EHV Power Transformers and Reactors	General Electric Co. Schenectady, New York	Petition filed August 7, 1972. Report on investigation made public May 25, 1973. Concluded that imports did not threaten to impair the national security.	37 FR 16635 August 17, 1972 38 FR 14442 June 1, 1973

Administering Authority: Secretary of the Treasury, 1973 - 1980
Authority Transferred by Executive Order 11725, dated 6/27/73. See also Pub. L 93-618, 1/3/75

Industry	Initiator	Date of Action & Status	Federal Register Reference
Oil (includes crude oil, crude oil derivatives and products and related products derived from natural gas and coal tar)	Secretary of the Treasury	Report on investigation made public January 24, 1975. Concluded that imports threatened to impair the national security. The President imposed a new system of supplemental fees on oil imports. The fee was subsequently reduced to zero.	40 FR 4457 January 30, 1975
Nuts, Bolts, and Large Screws of Iron or Steel (Except Mine Roof Bolts)	Presidential Directive	President directed the initiation of investigation on February 10, 1978. Report on investigation made public November 1, 1978. Concluded that imports did not threaten to impair the national security.	43 FR 8322 March 1, 1978 43 FR 51745 November 6, 1978
Oil (includes crude oil, crude oil derivatives and products, and related products derived from natural gas and coal tar)	Secretary of the Treasury	Investigation initiated on March 15, 1978. Report on investigation made public on March 21, 1979. Concluded that imports threatened to impair the national security. Several actions were recommended. None taken.	44 FR 7264 February 6, 1979 44 FR 18818 March 29, 1979
Administering Authority: Secretary of Commerce, 1980 to Present Authority Transferred by Executive Order 12188, 1/2/80			
Glass-Lined Chemical Processing Equipment	Ceramic Coating Company, Newport, KY	Petition filed March 13, 1981. Report on investigation made public on March 18, 1982. Concluded that imports did not threaten to impair the national security.	46 FR 45977 September 16, 1981 47 FR 11746 March 18, 1982

Industry	Initiator	Date of Action & Status	Federal Register Reference
Chromium, Manganese and Silicon Ferroalloys and Related Materials	The Ferroalloys Association, Washington, D.C.	Petition filed August 18, 1981. Report submitted to the President in August, 1982. President announced that he would further assess the impact on ferroalloy imports on the national security following a review of the Generalized System of Preferences (GSP) as applied to certain ferroalloy imports. He also ordered the initiation of a program to upgrade the stockpile to ferroalloy (high carbon ferromanganese and high carbon ferrochromium) form.	46 FR 49927 October 8, 1981 U.S. Dept. of Commerce News (press release) ITA 82-164, 12/3/83
Crude Oil from Libya	Presidential Request	In March 1982 the Secretary reported that the 1979 finding of the Treasury Department's 232 study on oil was still valid: that imports threatened to impair the national security. The President embargoed crude oil produced in Libya.	Presidential Proclamation 4907 47 FR 10507 March 11, 1982
Nuts, Bolts, and Large Screws of Iron or Steel (Except Mine Roof Bolts)	Secretary of Defense	Request filed February 11, 1982. Report on investigation made public February 25, 1983. Concluded that imports did not threaten to impair the national security.	47 FR 13546 March 31, 1982 48 FR 8842 March 2, 1983
Metal-Cutting and Metal-Forming Machine Tools	National Machine Tool Builders' Association, McLean, Virginia	Petition filed March 10, 1983. Investigation to be completed by March 14, 1984.	48 FR 15174 April 7, 1983

Chairman GIBBONS. The American Association of Exporters and Importers, Peter Suchman.

STATEMENT OF PETER SUCHMAN, MEMBER, TRADE POLICY COMMITTEE, AMERICAN ASSOCIATION OF EXPORTERS & IMPORTERS

Mr. SUCHMAN. Mr. Chairman, thank you very much. The American Association of Exporters and Importers welcomes this opportunity to present its views to this subcommittee on options to improve the trade remedy laws. My name is Peter Suchman. I am obviously not Gail Cumins, who was originally scheduled to testify on behalf of the association but could not make it.

Chairman GIBBONS. We understand. We apologize about the delay.

Mr. SUCHMAN. I am with the New York and Washington law firm of Sharretts, Paley, Carter, & Blauvelt, and I am a member of the trade policy committee of the association.

Chairman GIBBONS. Do you want us to put all of Ms. Cumin's statement in the record as if you had delivered it?

Mr. SUCHMAN. Yes, if you would, Mr. Chairman.

Chairman GIBBONS. All right. Go ahead.

Mr. SUCHMAN. The American Association of Exporters and Importers is a nationwide association, established in 1921, and has over 1,300 members involved in exporting from and importing to the United States. It is the largest organization in the country representing members involved in international trade.

Because of the diverse nature of the association's membership, our remarks will be rather more general than specific in nature. However, we believe this does not diminish from their value to this subcommittee, given the fact that it is the membership of this organization—the American businessmen and corporations—and their employees who import and export for a living who are most directly and severely impacted by the laws and practices under review today.

In our view, the U.S. statutory scheme, which has evolved for the imposition of import remedies, as presently administered is not working. It has been consistently attacked by spokesmen for domestic industries as providing insufficient protection. Various provisions have been challenged by our trading partners as inconsistent with our international obligations. The administration of these laws has absorbed ever-increasing amounts of U.S. Government resources—resources which remain insufficient to the adequate administration of the laws as written—while there has been no identifiable benefit for the national interest. Meanwhile, both substantively and procedurally, the legal structure which has been created has become evermore burdensome and arbitrary, denying importers equitable treatment, and consumers, and the U.S. economy as a whole, the benefits of open markets and free competition. One need only look to the present restrictions applicable to imports of apparel, steel, and autos to appreciate the failure, thus far, of the various U.S. trade provisions and those administering them to deal with the underlying problems that have eroded the competitiveness of those industries.

The statutes affecting imports, the antidumping and countervailing duty laws, the escape-clause provision—section 201—section 301, section 337, and section 406, have been amended from time to time in recent years in an ad hoc fashion by Congresses pressed by constituents to do something about imports, aided and abetted by administrations eager for authority to negotiate international agreements, and not terribly concerned whether the resulting import restraint laws make any sense. As a result they do not.

Among the provisions which make the least sense and cause the greatest burden on the parties concerned, and on Government resources, are the interlocutory appeal, and the administrative review procedures established by title VII of the Tariff Act of 1930, as amended by the 1979 Trade Agreement Act. Along with the severe limitations on the authority of the Government to seek negotiated solutions to trade conflicts, the unwillingness of the administering authority to grant a presumption of correctness to the use of generally accepted accounting principles in making price and cost comparisons, the arbitrary application of high rates of estimated duties, the increasing inability or unwillingness of the administering authority to disclose at the appropriate times to the parties how calculations have been made, and perhaps most grievously of all, the consistent use of the information least favorable to import interests instead of the "best information available," as provided for in title VII (766(b)) of the Act, these provisions and practices have turned the antidumping and countervailing duty laws from their traditional role as remedial instruments into punitive statutes designed to discourage trade with the United States.

The greatest failure of this statutory scheme is that no attempt has been made to mesh any of the provisions mentioned so that they can be used in a comprehensive way to improve the efficiency of the U.S. economy and to prevent indefinite protection to "problem industries." No linkage of relief or continuation thereof to a realistic industry-proposed and Government-monitored plan for industrial adjustment exists. I think this is something that you were discussing earlier with the previous witnesses. And I might add that as a former government official who spent 13 years in this area, my experience is that the consideration of the ability of an industry to adjust in determining whether or not it shall get relief is minimal at best, and minimal because, as the Government witnesses I think admitted, there are really no adequate facilities in the Government to make those determinations.

During recent years it has become fashionable in Washington to affirm one's commitment to open markets, while bemoaning the unfair trade practices of everyone else on the planet. The number and pattern of petitions filed under certain of these provisions is testimony to gradual conversion of these remedies into a playing field for industries seeking legal protectionism—with the Government having lost control of the game.

I would like to quote what the 1983 Economic Report of the President had to say on this subject—I will not repeat the entire quote, but I believe that the underlined part, that is that "The belief that departures from free trade are automatically called for if other countries do not play by the rules is a fallacy" is a point that often gets lost in discussion of these issues. In fact I think the

President made a statement about this yesterday when he said that we are all in the same boat and just because the other fellow shoots a hole in it, we do not improve the situation by shooting a second hole in it, all that does is get us wet. That has been the attitude of the Government and the Congress on the question of fair and unfair trade practice remedies.

When the Government is unable to control its intervention it is unable to carry out any strategic purpose.

The risks discussed in the President's report have in fact become reality. Do we need even question the permanency of protection? What could be more institutionalized than the system for restricting textile imports, here and around the world.

As for the cycle of retaliation mentioned in the President's report, we note that according to the Deputy Assistant Secretary of Commerce for Import Administration, it is well underway. That official is cited in the March 7, 1983, edition of Washington Tariff and Trade Letter as warning that U.S. firms should be alert to the increasing possibility that their business overseas could become targets of countervailing and dumping actions brought by foreign competitors. In meeting with the President's Export Council Subcommittee on Trade Incentives, Deputy Assistant Secretary Gary Horlick warned that foreign governments, having learned their lesson from the United States' use of these provisions, are adopting similar provisions or resurrecting dormant ones. Chile, India, the Philippines, Spain, and Japan were specifically mentioned. We might add that Canada and the European Community have become very active antidumpers in the past decade, with U.S. exporters the principal target for their actions.

Obviously, the association is concerned with retaliatory actions against U.S. exporters or U.S. investment abroad—often the destination for U.S. exports. Those who advocate unilateral action under U.S. law to resolve trade disputes like to completely ignore or at best minimize the potential serious consequences for our economy that can result from foreign retaliation. The fact is that almost all the growth in manufacturing employment in the United States in recent years has been export-related, while between 25 percent and 40 percent of our agricultural acreage is devoted to commodities which are exported. And while our merchandise trade balance has shown consistent deficits in recent years, due in large part to the increased cost of petroleum, our current account has been in rough balance as the result of our exports of services and the return on investment abroad. Thus, while complaints are many, the multilateral trading system continues to work for the United States and our stake in its survival is as large as ever.

Mr. Chairman, while we are critical of the present statutory scheme because of its unfairness, and for the other reasons we have enumerated, and most of all because it does not serve the national interest, the association has not come here today to advocate any quick fix for these obvious deficiencies in the law and its administration. We believe that many of the problems which exist today do so because the Congress and the executive branch have failed to approach the management of international trade by the United States from a national interest perspective. On the contrary, Congress has tinkered with this provision or that based largely on constituent pressure and the relative negotiating positions of the two branches determined by the administration's willingness to accept limitations on its flexibility in return for authority to engage in multilateral trade negotiations.

We think that it is time for this tinkering to stop. The executive branch and the appropriate committees of the Congress must together seek to develop a comprehensive statutory scheme, possibly including the reordering of the trade functions within the executive branch, which addresses the vital relationship between import relief and industrial adjustment in the mature American economy of the 1980's, which provides the U.S. Government with the means to achieve the objectives it believes to be in the overall economic interests of the United States, and which guarantees all parties to import-relief procedures the evenhanded and equitable treatment in the administration of the law to which they are entitled under our system.

We, therefore, urge that this committee take steps to set in motion such a joint congressional-executive branch analysis, with a view toward the development of a cohesive and rational approach to the dynamic interaction between the United States and the world economies.

AAEI stands ready to actively participate in such an effort.

Thank you, Mr. Chairman.

Chairman GIBBONS. What do you know about the proposal that the President has made to merge USTR and Commerce?

Mr. SUCHMAN. Only what I read in the papers.

Chairman GIBBONS. What is your opinion of it?

Mr. SUCHMAN. I will be glad to give you my opinion. I want to stress that it is mine and not the association's. You may recall that I testified before this subcommittee a couple of years ago when reorganization plan No. 3 was before the Congress, urging that it not be approved. I did not think that the Commerce Department was the appropriate situs for the administration of the unfair trade-practice remedies. I had the pleasure or displeasure of administering those statutes for several years while in the Treasury Department.

Chairman GIBBONS. I recall.

Mr. SUCHMAN. I think that many of the problems that we foresaw at that time have been borne out. The creation of a coequal branch, coequal department with STR in the conduct of trade policy has created great problems. I think that the proposed solution, as far as I understand it, is not going to better the situation. I do support the idea of a single trade agency. I do not think, however, that the idea of building it out of the present Commerce Department is the way to go. Certainly there are certain parts of that Department which would need to be included in a new entity.

Chairman GIBBONS. Still, your personal opinion. Why do you not think Commerce should do this?

Mr. SUCHMAN. Well, for one thing, as I understand it, many of the parts of the Commerce Department which would be included in the new entity are not involved in trade. They are involved in various aspects of monitoring the domestic economy and domestic industry. I think it is vital that a trade agency be an honest broker, that it fill the gap between domestic interests and foreign economic policy interests. I do not think an agency which continues to by and large represent domestic industry interests should also be the trade agency. So, if you create one, you have to leave a Commerce Department somewhere.

I do not think that—I think the strength of USTR has always been that it has played the role of honest broker between competing domestic interests and foreign interests. I do not think it can play that role if it is also supposed to be the spokesman in Washington for domestic industry. I also think that a lean, mean agency, I think, as Senator Roth has characterized it, will do a better job in this area than one that includes 17,000 or 18,000 people. I do not think that is necessary in this area.

Chairman GIBBONS. The administration bill as it has been described to me is the Roth bill with some modifications that have not been specified. Would not a lean, mean agency really just have all the employees out of Commerce, if they are going to get rid of Commerce? What you are saying is, they will keep Commerce. I do not know whether the Roth bill has been compromised or whether the President's program has been compromised. I am trying to find out. You have had a lot of experience, and I am trying to get the picture.

Mr. SUCHMAN. It is hard to talk about this because we have not seen specifically what the administration proposes, but my understanding of it is that it would include almost all of the Commerce Department aside from NOAA, and that means all of the parts of Commerce which monitor domestic industries, which were described earlier by a previous witness, general economic analysis, the Bureau of the Census. I do not really think that a trade agency needs all that, and I think that if you included it, the new agency would really be the Commerce Department with a new name. I believe any new agency should be built around USTR rather than around the U.S. Commerce Department.

Chairman GIBBONS. Well, the problem about building it around USTR is that it makes the White House look awful heavy as far as staff is concerned, and that has always been a political problem. All the Presidents lie about how much staff they have, anyway, because they borrow staff from all over the United States, and keep them down there under the guise that they are really not working for them, that they are really working for somebody else. And so, there is no truthful base of information as to how many people do work in the White House operation. But assuming that USTR, other than the chauffeurs, is one of the largest agencies in the White House staff, it looks to me like Mr. Baker just decided he wanted to get rid of some people around there, although most USTR people have never been in the White House and will never be in the White House, unless they go there for some reception or something. It just appears to me they have tried to clean up the table of organization down at the White House by throwing the USTR out. Maybe we just ought to keep the USTR and let it work for Congress.

Mr. SUCHMAN. Well, I think that the USTR over the years has performed valiantly in view of the burdens it has had to bear. One of the reasons why I support the idea of a new agency is that I think that it needs to have a better bureaucratic structure. It has always had to depend upon the other agencies for a lot of its support, and with the emergence of the Commerce Department as a rival in the formulation of trade policy, I think it has found itself at a disadvantage. The other thing that has always concerned me is the lack of a cadre of career trade people in the U.S. Government. Having been one, I know that the only way to construct a career path in the U.S. Government in trade is to be ready to move between agencies, resign one position, look for another one—there really is no home in the U.S. Government for trade bureaucrats, and that is one of the reasons why we do not approach negotiations with the same institutional memory that our trading partners do.

Chairman GIBBONS. I find that to be very true. I find that, in these spasmodic negotiations, other countries tend to send the same people and we tend to send a lot of people who are just learning the names and where the restrooms are and things like that. They are good, but it takes some time to get a handle on the basic facts. It is no mean swipe at them individually, but you have got to have experience. You have to know what happened in the last negotiation and what the bargaining point is probably going to be before you can get started in it. It looks like we are embarked upon another round of furniture shuffling down there.

Thank you for your views.

Mr. SUCHMAN. Thank you, Mr. Chairman.

[The prepared statement of Gail T. Cumins follows:]

STATEMENT OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, PRESENTED BY MS. GAIL T. CUMINS, CHAIRMAN, AAEI TRADE RESTRICTIONS COMMITTEE

Mr. Chairman, the American Association of Exporters and Importers welcomes this opportunity to present its views to this Subcommittee on options to improve the trade remedy laws. My name is Gail T. Cumins. I am with the New York and Washington law firm of Sharretts, Paley, Carter and Blauvelt, and I am Chairman of the Trade Restrictions Committee of the Association.

The American Association of Exporters and Importers is a nationwide association, established in 1921, and has over 1,300 members involved in exporting from and importing to the United States, as well as firms servicing the international trade community, including banks, insurance companies, shipping lines, brokers and law firms. It is the largest organization in the country representing members involved in international trade.

Because of the diverse nature of the association's membership, our remarks will be rather more general than specific in nature. However we believe this does not diminish from their value to this Subcommittee, given the fact that it is the membership of this organization—the American businessmen and corporations—and their employees who import and export for a living who are most directly and severely impacted by the laws and practices under review today.

In our view, the U.S. statutory scheme, which has evolved for the imposition of import remedies, as presently administered is not working. It has been consistently attacked by spokesmen for domestic industries as providing insufficient protection. Various provisions have been challenged by our trading partners as inconsistent with our international obligations. The administration of these laws has absorbed ever increasing amounts of U.S. government resources—resources which remain insufficient to the adequate administration of the laws as written—while there has been no identifiable benefit for the national interest. Meanwhile, both substantively and procedurally the legal structure which has been created has become ever more burdensome and arbitrary, denying importers equitable treatment, and consumers, and the U.S. economy as a whole, the benefits of open markets and free competition. One need only look to the present restrictions applicable to imports of apparel, steel and autos to appreciate the failure, thus far, of the various U.S. trade provisions and those administering them to deal with the underlying problems that have eroded the competitiveness of those industries.

The statutes affecting imports, the antidumping and countervailing duty laws, the escape clause provision (Section 201), Section 301, Section 337 and Section 406, have been amended from time to time in recent years in an ad hoc fashion by Congresses pressed by constituents to "do something about imports", aided and abetted by administrations eager for authority to negotiate international agreements, and not terribly concerned whether the resulting import restraint laws make any sense. As a result they don't.

Among the provisions which make the least sense and cause the greatest burden on the parties concerned, and on government resources, are the interlocutory appeal, and the administrative review procedures established by Title VII of the Tariff Act of 1930, as amended by the 1979 Trade Agreement Act. Along with the severe limitations on the authority of the government to seek negotiated solutions to trade conflicts, the unwillingness of the administering authority to grant a presumption of correctness to the use of generally accepted accounting principals in making price and cost comparisons, the arbitrary applications of high rates of estimated duties, the increasing inability or unwillingness of the administering authority to disclose at the appropriate times to the parties how calculations have been made, and perhaps most grievously of all, the consistent use of the information least favorable to import interests instead of the "best information available", as provided for in Title VII (766(b)) of the Act, these provisions and practices have turned the antidumping and countervailing duty laws from their traditional role as remedial instruments into punitive statutes designed to discourage trade with the United States.

The greatest failure of this statutory scheme is that no attempt has been made to mesh any of the provisions mentioned so that they can be used in a comprehensive way to improve the efficiency of the U.S. economy and to prevent indefinite protection to "problem industries". No linkage of relief or continuation thereof to a realistic industry-proposed, and government-monitored plan for industrial adjustment exists.

During recent years it has become fashionable in Washington to affirm one's commitment to open markets, while bemoaning the "unfair trade practices" of everyone else on the planet. The number and pattern of petitions filed under certain of these provisions is testimony to gradual conversion of these remedies into a playing field for industries seeking legal protectionism—with the government having lost control of the game.

I would like to quote what the 1983 Economic Report of the President had to say on this subject:

"Trade-distorting measures, whether they take the form of protection against imports or the promotion of exports, hurt the country which adopts them as well as other countries, even when they are a response to foreign trade-distorting practices. If foreign governments limit imports from the United States and we respond in kind, the initial results will be further reductions in economic efficiency at home and higher domestic prices. If foreign governments subsidize exports, depressing world prices for U.S. products, a countersubsidy by the United States will depress prices still further. The belief that departures from free trade are automatically called for if other countries do not play by the rules is a fallacy.

"Intervention in international trade by the U.S. Government, even though costly to the U.S. economy in the short run, may, however, be justified if it serves the strategic purpose of increasing the cost of interventionist policies by foreign governments. Thus, there is a potential role for carefully targeted measures, explicitly temporary, aimed at convincing other countries to reduce their trade distortions.

"There are obvious risks in such a course of action. Instead of inducing other countries to move toward freer trade, U.S. pressure might set off a cycle of retaliation which would leave everyone worse off. There are also domestic political risks. Trade measures intended to be temporary may end up permanent and institutionalized".

When the government is unable to control its "intervention" it is unable to carry out any strategic purpose.

The risks discussed in the President's Report have in fact become reality. Do we need even question the permanency of protection? What could be more "institutionalized" than the system for restricting textile imports, here and around the world.

As for the "cycle of retaliation" mentioned in the President's Report we note that according to the Deputy Assistant Secretary of Commerce for Import Administration it is well underway. That official is cited in the March 7, 1983 edition of Washington Tariff and Trade Letter as warning that U.S. firms should be alert to the increasing possibility that their business overseas could become targets of countervailing and dumping actions brought by foreign competitors. In meeting with the President's Export Council Subcommittee on Trade Incentives Deputy Assistant Secretary Gary Horlick warned that foreign governments, having learned their lesson from the U.S.'s use of these provisions, are adopting similar provisions or resurrecting dormant ones. Chile, India, the Philippines, Spain and Japan were specifically mentioned. We might add that Canada and the European Community have become very active "antidumpers" in the past decade, with U.S. exporters the principal targets for their actions.

Obviously, the Association is concerned with retaliatory action against U.S. exporters or U.S. investment abroad (often the destination for U.S. exports). Those who advocate unilateral action under U.S. law to "resolve" trade disputes like to completely ignore or at best minimize the potential serious consequences for our economy that can result from foreign retaliation. The fact is that almost all the growth in manufacturing employment in the United States in recent years has been export related, while between 25% and 40% of our agricultural acreage is devoted to commodities which are exported. And while our merchandise trade balance has shown consistent deficits in recent years, due in large part to the increased cost of petroleum, our current account has been in rough balance as the result of our exports of services and the return on investment abroad. Thus while complaints are many, the multilateral trading system continues to work for the United States and our stake in its survival is as large as ever.

Mr. Chairman, while we are critical of the present statutory scheme because of its unfairness, and for the other reasons we have enumerated, and most of all because it does not serve the national interest, the Association has not come here today to advocate any quick fix for these obvious deficiencies in the law and its administration. We believe that many of the problems which exist today do so because the Congress and the Executive Branch have failed to approach the management of international trade by the United States from a national interest perspective. On the contrary Congress has tinkered with this provision or that based largely on constituent pressure and the relative negotiating positions of the two branches determined by the administration's willingness to accept limitations on its flexibility in return for authority to engage in multilateral trade negotiations.

We think that it is time for this tinkering to stop. The Executive Branch and the appropriate committees of the Congress must together seek to develop a comprehensive statutory scheme (possibly including the reordering of the trade functions within the Executive Branch) which addresses the vital relationship between import relief and industrial adjustment in the mature American economy of the 1980's, which provides the United States Government with the means to achieve the objectives it believes to be in the overall economic interests of the United States, and which guarantees all parties to import relief procedures the even-handed and equitable treatment in the administration of the law to which they are entitled under our system.

We therefore urge that this Committee take steps to set in motion such a joint Congressional-Executive Branch analysis, with a view toward the development of a cohesive and rational approach to the dynamic interaction between the U.S. and the world economies.

AAEI stands ready to actively participate in such an effort.

Chairman GIBBONS. Mr. Heron.

STATEMENT OF JULIAN B. HERON, JR., HERON, BURCHETTE, RUCKERT & ROTHWELL, WASHINGTON, D.C.

Mr. HERON. Thank you, Mr. Chairman. My name is Julian Heron. I am testifying in my individual capacity and not as a member of the Agricultural Policy Advisory Committee nor as chairman of the U.S. Agricultural Export Development Council. I appreciate the opportunity to appear before you. Today when unfair trade practices are threatening the economic survival of U.S. industries, the United States must have strong and effective mechanisms for counteracting this threat and defending our economic interests in the international marketplace.

Strength and efficiency are particularly vital to the section 301 and international dispute-settlement procedures, which will be the focus of this statement. These procedures are the private sector's principal means of relief against export-oriented trade restrictions. Moreover, they are trade remedies that must be pursued by the U.S. Government alone. The private sector is not authorized to bring an action before the GATT or to retaliate against unfair foreign-trading practices. Only our Government can do this.

As the guardian of U.S. trading rights, our Government must be prepared to act swiftly and aggressively to protect domestic interests. Nowhere is this more necessary than in the agricultural sector, where trade in perishables and annual crops cannot be put on indefinite hold while trade concerns are debated and redebated by an interagency committee.

Today, 301 petitions are being filed with growing frequency. To Ambassador Brock's credit, more cases are being taken to the GATT than ever before. This is as it should be.

However, through the growing use of section 301 and international dispute settlement, certain procedural and institutional problems have become apparent. These problems should be considered by your subcommittee in its efforts to improve our trade remedy laws. These problems can be categorized, for ease of discussion, in two groups: Those relating to the acceptance of the 301 petition, and those connected with the timing and method of prosecution of a 301 action.

At the petition stage, Government biases and unwieldy procedural requirements discourage the private sector from seeking 301 relief as often as is necessary. They also interfere with sound Government decisionmaking on matters of trade relief.

As a threshold problem, the interagency 301 Committee views section 301 and international dispute settlement procedures as undiplomatic and hostile actions to be pursued with maximum caution. Section 301 and dispute settlement are the established methods of settling trade disputes and should be readily used. Any resistance in this regard is an obvious disservice to U.S. industry. Equally important, it is a disservice to the international trading system. The United States cannot expect adherence to the principles of free trade if it does not rapidly and forcefully challenge violations of these principles. The burden of proving proper action should be on the country against which the complaint is made, rather than on the U.S. citizen raising the complaint.

Perhaps reflecting their predisposition against aggressive-dispute settlement, the Section 301 Committee has developed a practice of imposing burdensome procedural requirements on all 301 petitioners. These requirements are one of the key areas demanding attention by this committee. Since the petition procedures serve to underscore a number of unfortunate weaknesses in the 301 process, they will be discussed in some detail, including a look at the problems associated with them and recommended changes.

The current requirements being placed on a 301 petitioner spring from a perception that a decision on whether or not to pursue 301 and dispute settlement should be based strictly on legal merit. This legalistic mentality is unrealistic and unproductive. While trade complaints should not be frivolous, they need not be restricted to open-and-shut legal cases.

It should be remembered that most trade disputes pursued under 301 and dispute settlement are ultimately resolved through political negotiations, not through persuasive presentations of trade law. As an example, in 1976 the U.S. soybean processing industry prepared to file a section 301 case against Brazil, seeking relief from certain export subsidy programs. Through a joint, cooperative effort at the highest levels of our Government, the United States was able to negotiate a withdrawal of the Brazilian programs without proceeding to formal dispute settlement. The record of past 301 complaints shows many similar negotiated settlements.

Even for those trade cases that are brought before a dispute settlement panel, the outcome may depend primarily upon the degree to which the participating countries are able to work through political channels to gain support for their respective positions among the GATT membership. This was illustrated in the United States' 1979 GATT complaint against Spain's domestic consumption quota on soybean oil. There, the GATT panel charged with reviewing the complaint issued recommendations unfavorable to the United States. Because U.S. negotiators were able to enlist the support of approximately 20 countries to oppose the adoption of the recommendations by the GATT Council, the panel's report was never formally accepted This result demonstrates the importance that politics play in GATT proceedings.

Despite this reality, petitioners are being required to prove their legal and economic case—and more—at the petition stage. The petitioner must provide, among other things, a complete description of each foreign trade practice raised in the petition, a detailed legal discussion of all rights and remedies, and, most unfortunate of all, a demonstration that the petitioner is sustaining clear injury as a direct result of such trade practices. These requirements exceed the Government's delegated authority under section 301 and simply represent bad policy. We do not believe that Congress requires these impediments.

Our domestic statute calls for an interested party requesting section 301 relief to "[set] forth allegations in support of the request." Nothing more than allegations is required. By insisting that the petitioner fully substantiate his complaint at the petition stage, the Government has gone beyond the statutory standard and created law of its own. Let us remember that the petition itself is of no importance other than to trigger the procedures involved. Once the petition is accepted, the Government proceeds as it pleases, and this is the way it should be. The petition then has no further use or effect.

It has been argued by some in the Government that a detailed petition is necessary, given the requirement under 19 U.S.C., section 2413, that the United States notify the concerned foreign government and request consultations regarding the issues raised in the 301 petition on the very day the petition is accepted. This is not a compelling argument, since notifications typically provide nothing more than bare allegations to the foreign government. Moreover, when the required consultations occur, they can take any form, including mere informational discussions.

In addition to having no statutory justification, the requirement that all trade complaints be substantiated fully at the petition stage cannot be defended as sound policy. The practice is contrary to the interests of both private industry and the U.S. Government, particularly in its insistence that the petitioner demonstrate damage and causation with respect to the challenged practices. This practice also tends to increase the legal expenses involved.

Procedures for trade relief are of questionable value to private industry if they cannot be used until damage has occurred, since international dispute settlement procedures do not provide for remuneration. Once serious loss is sustained, that loss is irreparable. This is especially true in the case of agriculture, where trade in seasonal crops can be lost almost entirely if relief is not provided at the first threat of damage. GATT should not be allowed to become a probate court for deceased industries. As an example, in the United States' canned fruit and raisin case, U.S. raisin exports to the EEC dropped by 71 percent in just 1 year following the introduction of EEC subsidies.

By demanding complete evidence of damage, the United States puts itself in the unfortunate posture of establishing a presumption against the rights of U.S. industry in favor of foreign competitors. Our industries cannot be adequately protected unless this presumption is reversed. If the private sector, which can best predict market forces, petitions for trade relief against an unfair foreign practice, the U.S. Government should be more willing to presume the logical adverse consequences of that practice, not only for purposes of the petition, but throughout the 301 process. Moreover, adverse consequences should not be restrictively defined as a clear showing of damage. Anticipatory injury, the creation of uncertainty on the world market, unrealized market potential, and other market conditions that cannot be displayed with statistical tabulations all restrict or threaten to restrict domestic earnings and should be sufficient for 301 relief.

Like the private sector, the Government does not stand to benefit from a policy that requires 301 determinations to be made on the basis of a petition alone. It cannot make an informed trade policy decision until after a full investigation—including a hearing, if requested—is completed. In many instances, the petitioner cannot develop his full case at the petition stage. Assistance and cooperation is needed from the relevant Federal agencies involved in the 301 process. Only through this close partnership effort can the merits of a trade complaint be fairly and accurately judged.

An outstanding example of such a partnership approach can be seen in the Foreign Agricultural Service. FAS has a long tradition of working closely with the agricultural sector to develop all necessary information on marketing opportunities and barriers. As an important side note, the Government should not consider diluting this partnership by placing FAS under the jurisdiction of any proposed Department of Trade.

Section 305, which allows the petitioner to obtain information in advance of a 301 action, is an unacceptable alternative procedure when serious trade loss is threatened. It typically is a means of obtaining only superficial information and is not administered with any sense of urgency. This is primarily because the Government is not required under section 305 to act affirmatively to resolve the trade problem raised in the request. A full section 301 investigation provides both the Government and the private sector with a better means of developing a complaint upon which to proceed.

For these reasons, it should be explicitly required by statute that the acceptance or rejection of the 301 petition be withheld until after an investigation and hearing are conducted on the matter.

The petition itself should be treated as nothing more than a device to trigger the investigative process. During the investigation, the agencies participating on the 301 committee should be charged with assisting the petitioner in every way possible to gather information on the trade practices raised in the petition, the effects of such practices, and all rights and remedies that might be available to the petitioner. Such a system, unlike the one now in place, would promote common direction and cooperation between the entire Federal Government and the private sector on matters of trade relief. At the close of this process, the petitioner should be required to provide the Government with a more detailed submission summarizing the results of the investigation and substantiating the complaints made in the petition.

If, based on the investigation and the petitioner's submission, the Government cannot find adequate grounds upon which to proceed, then the petition can be rejected. But the mere absence of statistical damage should not be deemed a sufficient basis for rejection. Clear statutory direction in this regard may be necessary.

To remove the alleged problem of having adequate information to notify foreign countries early of a 301 complaint, the notification and consultation requirement should be delayed until after the investigation is completed. This should satisfy any Government concern about proceeding in international dispute settlement with maximum certainty and specificity.

The petition acceptance process is only one of the difficult areas associated with obtaining trade relief under section 301.

Within the United States, the prosecution of a 301 action is weakened by the same mentality that affects the acceptance of a 301 petition. Because certain agencies represented on the 301 committee have viewed dispute settlement as a hostile act, it is difficult for our Government to unify in a forceful pursuit of trade relief. Ambassador Brock has greatly improved this, but more improvement is necessary.

A few examples will serve well. In 1969, under the predecessor to section 301, section 252 of the Trade Expansion Act of 1962, the citrus industry petitioned for trade relief against EEC preferential import duties on citrus from certain Mediterranean countries. In 1976, the petition was refiled under section 301. It was not until 1981, 12 years after the date of the initial petition, that the 301 committee agreed to pursue dispute settlement under the GATT. Similarly, in the United States wheat flour case, the 301 petition was filed in 1975; following 6 years of unsuccessful bilateral discussions, the Government finally decided to invoke the dispute settlement provisions of the subsidies code to challenge EEC export subsidies on wheat flour.

These delays allow our foreign competitors to question the United States' commitment to protecting its trading interests. When U.S. commitment is questioned, our leverage at the negotiating table is weakened. If there is disunity within the Government this can be cured by congressional oversight of all 301 and dispute settlement actions.

The Government must be held closely accountable to this committee and other Members of Congress for progress made and action intended in pending 301 cases. In each case, Congress must insist upon a strong national commitment to protecting trade rights and interests forcefully through established dispute settlement procedures.

But the problems in prosecuting a 301 action are not caused by the United States alone. For different reasons, our foreign trading partners participating in trading complaints by the United States have also shown little commitment to formal dispute settlement. Their intransigence, combined with institutional shortcomings, have cast some doubt on the value of pursuing these procedures at all.

In the United States wheat flour case, for example, the established time limitations for dispute settlement under the Subsidies Code were repeatedly ignored by the EEC as well as the panel reviewing the case. The recently released panel report was a year overdue.

This committee knows that the United States made a number of significant concessions during the Tokyo round—including the addition of an injury standard in the U.S. countervailing duty laws—with the understanding that the subsidies code would establish stricter standards and procedures for dispute settlement. Whether this will occur remains in doubt.

The United States' canned fruit and raisin case has also suffered from procedural delay. At the panel hearing stage, delays occurred to accommodate the EEC's summer vacation. Late in the hearing process, one of the panelists was recalled from Geneva as a matter of routine practice, requiring a new panel member to be selected and briefed. Although these delays may seem insignificant, they have allowed the subsidies being challenged to continue into a new crop year, meaning substantial additional loss to the U.S. industries.

Even if a case successfully completes the panel hearing process, there are no assurances that other GATT members will adhere to the ruling, or that a meaningful panel report will even be issued. The recent wheat flour report, which failed to reach a legal conclusion, has reinforced this concern.

GATT trade laws and enforcement machinery are not being seriously followed by the EEC and other trading partners defending U.S. complaints because there is no political will to do so. The Europeans and other foreign countries using unfair trade practices simply have no incentive to alter the status quo while they are capturing world markets.

For this reason, a multilateral effort to renegotiate the trade rules and dispute settlement procedures may not help until other changes occur. The GATT Ministerial meeting at the end of last year suggests that such an agreement may not be possible at all.

Our foreign trading partners will only renew their commitment to fair and effective GATT principles and procedures when it is in their interest to do so. This will only come about if the United States takes strong, affirmative action to recapture markets lost due to unfair trade practices. By taking such action, the United States can demonstrate to our trading partners that it is far better to conduct trade on the basis of fair competition than on the size of one's Treasury.

The administration's blended credit program and sale of wheat flour to Egypt are a step in the right direction. Additional price and credit measures must be provided to convince the EEC and other trading partners to recommit themselves to the GATT.

This course of action is essential if the GATT is to be restored as a strong and effective mechanism for regulating trade. Without such a mechanism, international commerce will be conducted solely on the basis of self-interested national regulation, and retaliatory action. This will ultimately lead to a sharp and chaotic restriction in the overall level of international trade.

It is in the mutual interest of the United States and all its foreign competitors to have a solid international trade framework that can rise above parochial concerns in order to discipline and balance trade interests. Several changes, including those described above and undoubtedly many others, will need to be made in both the domestic and international arenas if such a framework is to be achieved. This committee is to be applauded for its leadership in beginning the process of evaluation and change.

Thank you, Mr. Chairman.

Chairman GIBBONS. I want to applaud you for your well-reasoned statement. You have given us a number of good suggestions and good challenges.

I want to go into the section 301 process in great detail, but before I do that I want to try to get the unfair trade practices, the countervailing and antidumping laws, straightened out if we can, because I think it will create some pressure, if we do, to get some other things done in the international arena. Maybe later on this year we will go into the section 301 practices. I would say to the staff, it may be helpful if sometime we have some panels where we mix Government and private witnesses so we can develop some sort of a debate or dialog between people who are pretty used to working with each other and perhaps get some of this stuff out on the table.

Bill, do you have a question?

Mr. FRENZEL. I was wondering what cases has your firm been involved with, which of these are 301's?

Mr. HERON. We brought the first citrus case under section 252, the first case filed under the statute. There were only three filed under the statute, and we brought two of them. The second was a similar case involving citrus when the European Community enlarged to include England, Ireland, and Denmark. Under section 301, the same citrus case was refiled. We prepared to file the soybean case referred to in the testimony against Brazil, and that was resolved. We brought the canned peach, pear, and fruit cocktail case against the EC minimum import price which was successfully resolved through the GATT process and negotiation. We filed the wheat flour case, which is still being resolved in GATT. We have recently filed a major landmark case on behalf of soybean oil and meal against numerous countries throughout the world, and their subsidy practices, and that case is still pending. The 45-day period there comes up on May 23.

I am trying to remember if I have left out one, but we have been involved on the sides—there was one against Taiwan where we moved to intervene on some commodities that were not part of the original complaint. And we have been involved in numerous section 305 requests for information.

Mr. **Frenzel**. Thank you.

Chairman **Gibbons**. Thank you very much.

Mr. **Heron**. Thank you.

Chairman **Gibbons**. The National Soybean Processors Association. Mr. Hauck.

STATEMENT OF TOM HAMMER, ON BEHALF OF SHELDON HAUCK, PRESIDENT, NATIONAL SOYBEAN PROCESSORS ASSOCIATION

Mr. **Hammer**. Mr. Chairman, my name is Tom Hammer. I am appearing here on behalf of Sheldon Hauck, the president of the National Soybean Processors Association, who as a result of some of the juggling of these hearings——

Chairman **Gibbons**. I apologize again for that.

Mr. **Hammer**. I am also with the firm of Heron, Burchette, Ruckert, and Rothwell. I am not a lawyer, I am serving as a Government relations adviser.

Before joining the firm, I served as Deputy Under Secretary at the Department of Agriculture for International Trade. If I may, I have a very short statement by the NSPA group, and I would like to read it. It is a very short statement.

At the outset, NSPA would like to commend the entire committee for its efforts to improve our domestic and international trade remedies. Forceful, efficient trade relief is essential to the continued growth and strength of U.S. industries. No industry is more painfully aware of this than the soybean industry.

Less than 1 month ago, NSPA filed with the Office of the U.S. Trade Representative a landmark agricultural section 301 petition. In the petition, NSPA requests relief on a worldwide basis, challenging the trade practices of several countries. The broad reach of our petition distinguishes it from other past or pending 301 complaints. The petition is global in scope because our trade concerns are pervasive, and trade relief, to be effective, must be styled accordingly.

Mr. Chairman, the U.S. soybean processing industry is heavily dependent upon international trade for its economic survival. In the most recent marketing year, the industry exported $1.3 billion of soybean meal and $0.4 billion of soybean oil. These quantities are significant, but they are far below our potential.

Traditionally, the United States was the primary supplier of soybean meal and oil to the world's importing countries. During recent years, however, the U.S. industry has lost a significant share of the international soybean meal and soybean oil market, such that it is now reduced to being what we call a residual supplier. This means that our soybean processing industry supplies only that residual demand that is not satisfied first by foreign suppliers.

Between 1973–74 and 1981–82, the U.S. share of world soybean meal exports dropped almost 40 percent, falling from 78 percent to 40 percent. During the same period, the U.S. share of the world's soybean oil trade declined from 70 percent to 31 percent. All must agree that these are dramatic losses.

In sharp contrast, during the same period, Brazil's share of world soybean meal exports more than doubled, from 22 percent to 52 percent, while its share of soybean oil exports jumped from negligible to 28 percent. Argentina's share of the world soybean meal trade during this time rose from negligible to 5 percent, while Spain's share of world soybean oil exports leaped from negligible to 18 percent. Other countries have experienced similar increases.

The primary reason, we believe, for the severe loss in the U.S. soyean processors' world-trade share and the corresponding increase in the world trade shares of other foreign suppliers is clear: our trading partners throughout the world have engaged in unfair trade practices that confer sizable benefits to local oilseed processors to the serious detriment of the U.S. industry. Such practices individually may have been disruptive to U.S. trade; taken together, they have been devastating. Absent these unfair practices, U.S. soybean processors—located in the midst of the largest supply of soybeans in the world and served by the world's most efficient plant, transportation, and exporting systems—would have, we are certain, remained preeminent as a world supplier of processed soybean products.

The trade restrictive activities facing our industry come in all varieties, ranging from export subsidies to production subsidies to quantitative restrictions. Among the major offending countries which are named in our petition are Argentina, Brazil, Canada, Malaysia, Portugal, and Spain.

Understanding the major causes of our deteriorating trade position has made the industry's choice a simple one. It can fight to remove the foreign trade practices that are preventing it from realizing its inherent economic potential, or it can succumb to a long-term period of decline. The industry's choice of course is to fight.

Since a commercial exporter cannot directly challenge the trade restrictive actions of a foreign country, NSPA must look to the U.S. Government to act on its behalf. The established vehicles for obtaining such assistance are limited. Indeed, the only trade remedy procedure available for requesting export-oriented relief is section 301.

It is against this backdrop that NSPA prepard and filed its 301 petition. The petition asks that the United States take all necessary and feasible steps to obtain the removal of foreign trade distorting practices so that U.S. soybean processors may compete fairly in the international market.

Although the request is straightforward, some in the Government may characterize the petition as too complicated or too broad-based. Unlike the traditional section 301 complaint, which addresses a single trade practice by a single country, NSPA's petition complains against several trade practices in several countries. Because our problems are worldwide, this broad approach is necessary. An isolated, single country or single practice pattern would not restore the fair and open world trading conditions in the oilseeds complex that we critically need.

NSPA believes that the section 301 provisions and implementing regulations are sufficiently broad to cover global complaints. This is a necessary interpretation if U.S. trade remedy laws are to have any meaning in our increasingly complex and integrated world trading system. Clear congressional direction may need to be provided to the Section 301 Committee in this regard.

Just as the traditional 301 approach will not work with our industry, neither will it suffice to use the typical methods of evaluating a 301 complaint. It has become the practice of our Government to accept or reject a complaint based strictly on its "GATT-ability"—that is, its legal merit under established GATT law. Legal merit under established GATT law has been interpreted by the interagency committee to mean whether or not a foreign government has violated any obligation to the United States under the provision of an applicable trade agreement. This interpretation of section 301 is unduly restrictive and ultimately does a great disservice to U.S. industry. Under section 301, GATT dispute settlement is only one alternative means of obtaining relief. The President is also authorized to act—bilaterally or unilaterally, if necessary—when unfair trade practices are burdening U.S. commerce. Once this burden has been shown, as we believe it has been in our case, trade relief should be provided. Thus, section 301 envisions relief to affected industries where U.S. commerce is burdened or restricted, whether or not a foreign government has violated the provisions of an ambiguous internal trade agreement.

If the Government does not grant trade relief under these circumstances, the burdened industry is simply left without recourse. Surely the Congress never intended that this be allowed.

The petitioning industry is not the only victim if the Government refuses to act on its behalf to eliminate burdensome trade restrictions. The labor force, the U.S. Treasury, and our entire economic structure also suffer, especially in the agricultural sector.

These larger effects can be graphically demonstrated in our own industry. During the 1981-82 crop year, for example, if an additional 7.7 million metric tons of soybeans had been processed in the United States instead of by unfairly competing foreign processors, and those products exported instead of the soybeans, the industry's capacity utilization would have been at an 85-percent level instead of at its actual 68.6 to 60 percent level we are currently experiencing. The value added by that additional processing would have meant an increase in gross output of $6.9 billion, an increase in gross employment of 61,000 workers, an increase in personal income of $1.2 billion, and an increase in Federal income tax revenue of $229 million. Thus, a failure by our Government to remove the trade practices that limit our industry's capacity effectively denies the United States' multibillion-dollar benefits that are sorely needed in today's economic climate.

Congress created section 301 with strong, broad authority to defend the interests of U.S. industries, and the law should be used. If, in practice, the executive branch unnecessarily restricts 301 relief to simple, crystal-clear GATT cases, Congress should intercede to assure that our trade remedy laws more realistically address and resolve the complex trade problems of the 1980s within the intent of the Trade Act of 1974.

To determine just how realistic and effective such laws are, we urge this committee to use NSPA's recently filed 301 petition as a textbook study. Examples of many, if not most, of the unfair trade practices facing U.S. agriculture today can be found in our petition.

The way in which these very real problems are handled by our Government should be of great interest to this committee as it considers the ways in which U.S. trade remedy laws can be improved.

To the industry, these issues are a matter of survival. Our soybean processing plants are running far below profitable levels or in some cases are in temporary shutdown. The root of this problem, unfair competition, is beyond our control. If our trade remedy laws cannot provide us with the needed redress, then we will need to prepare ourselves for continued decline. I sincerely hope that we are not left with this outcome.

Mr. Chairman, this concludes the remarks of the National Soybean Processors Association. I appreciate the opportunity to appear before you on their behalf, and we look forward to working with you in the up and coming months on your consideration of the 301 remedy, and also as the 301 case moves through its bureaucratic endeavors.

Chairman GIBBONS. Mr. Hammer, you have a fine statement. First of all, I want to take you up on that offer to use your petition as sort of a casebook study of some of these unfair practices. I wonder if you would drop off a copy of the petition at my office.

Mr. HAMMER. We would be happy to do this. I believe that we have delivered a number of those petitions already.

Chairman GIBBONS. That is fast. I have one right now.

Mr. HAMMER. Like I said——

Chairman GIBBONS. Can you tell me, what does Canada do, what does Malaysia do?

Mr. HAMMER. The practices that we are talking about in Canada, some of them have been in effect for a long time, and they have to do with tank car leasing and transportation subsidies that benefit the process or moving their product to points of export. Most recently the problem that we encountered was a provincial problem where Alberta decided to apply a $40 per ton direct payment to the crushers, which we think is perhaps one of the most blatant forms of subsidy that we have encountered so far. To the credit of the U.S. Government, once they received a draft of the proposed 301 that we have been working with USTR very closely on, they were in contact with the Canadian Government, the national government, who is very distressed by Alberta's programs, and we believe that we have some sort of tentative assurance that Alberta may stop that program. However, it is still in effect as of this date, and what we are hoping to get from the filing of this petition is an agreement that it will be terminated once and for all.

Malaysia is a different situation. It has to do with palm oil. The primary problem that we have encountered there is that they have differential export duties, keeping the crude palm oil a higher export duty on it, thereby encouraging the processing of the crude at home, giving an extra incentive, and we have been able to calculate this—Argentina and Brazil do it on soybean seeds and we have been able to calculate a subsidy effect in terms of the incentive and profit margin that the crushers get. If duties are made the same on both refined and raw products, then the benefit of keeping that product at home as a pool and resource for the domestic industry to use then takes away the subsidy effect that the processors get.

We can provide this committee with some interesting calculations on just what advantage that provides to industries that allow this.

Chairman GIBBONS. Is that in your brief or your petition?

Mr. HAMMER. The reference to the differential export duties is there. We have been refining since the petition was filed much of our economic data. We have been working with USTR and USDA, but the chart that we have about the subsidy effect of these differential export duties has just been prepared recently. It uses some real-life examples.

Chairman GIBBONS. I would like to see that, because I am going to be meeting with the Malaysians.

Mr. HAMMER. We have attaché reports that suggest the differental export subsidies are a form of industrial targeting. The reports that we have from Malaysia, the indications are it was done to do what we described, to give an incentive, a positive incentive to be exporting the processed products rather than the crude palm oil. But that problem—we have lost for example half of the Indian market. At one time we developed through Public Law 408 all the Indian vegetable market. We taught the Indians all the aspects of it. It is a major market, and we now serve none of it. It has gone 50 percent to Brazil in soybean oil and 50 percent to Malaysia, and we are not in the market any more after years of U.S. Government investment in that market.

Chairman GIBBONS. Mr. Frenzel.

Mr. FRENZEL. You say that your distress is due totally to unfair practices by other countries. Did you not get started down the road to distress by the oilseed embargo?

Mr. HAMMER. Mr. Frenzel, there can be no denying that the embargo by the United States on oilseeds gave a great incentive to the Brazilians and others to move into that area. We have created a time line—we do not have in this material, but in our preparation for the case, from 1965 until present, and it cannot be denied that that had an impact, but the fact that the price levels and the crushing margins by our competitors are so much more advantageous than ours are leads us to believe that in large part it is because of government benefits that are being bestowed upon the processors.

Mr. FRENZEL. We will take a look at your report and see if we can come to the same conclusion. It is alleged, however, that that embargo did not do us any good, and of course we have a little problem of East-West trade. I am told that the Russians entering soybean orders specify that it will not be of American origin; is that correct?

Mr. HAMMER. I am not involved in the ordertaking for the industry. I know from my experience as Deputy Under Secretary at the Department of Agriculture that we have had serious repercussions from that and it has affected the purchases of wheat, protein, corn. I would not be surprised if that is not the case. I do know that negotiations hopefully for restoring trade in those products will be undertaken in very short order.

Mr. FRENZEL. I would be anxious to look through your case, but I think there are other factors abroad in the world that have something to do with your situation except for these other ones. Your statement was very fierce. You are indicating that you want to take unilateral action even when there is not a showing of an unfair provision under the GATT. That would be quite a distinct policy change, would it not?

Mr. **HAMMER**. Let me make two statements about that. First, to your previous comment, we are not trying to portray in any sense of the petition that these are the only aspects that are going on in the international trade. We recognize that there are other factors taking place. On balance, however, we feel that these have been the major aspects that have moved this position of processing from the United States to other positions around the world to the point where we think we are now faced with perhaps many shutdowns in our industry.

Let me describe what we were saying. The 1974 act and the 301 provisions provide broad-based opportunity to deal with our foreign trading partners. For example, there is some question that the differential export duties are not something that expressly is prohibited in a narrow interpretation of GATT. We however can quantify the actual subsidy effect of these differential export duties. We can show you statements by—that indicate that this was the purpose for which these programs were put in place in those various countries, and we think it unduly restrictive to only take a case if it is GATT-able or if it is winnable. We think that there are other alternatives, bilateral negotiations, expressions of concern of our trading partners that these are in fact impairing the ability of our industry to participate in the world trading system.

Mr. **FRENZEL**. I guess I do not disagree with that. I am a little nervous about taking unilateral action, particularly when your clients are the ones that are likely to be the purple-hearted casualties.

Mr. **HAMMER**. Well, all I can say is they have to consider that, too, Mr. Frenzel. They have to—they will have to be the ones to make a business decision that affects themselves, and right now their concern is absent some form of relief and a partnership with the U.S. Government that their position in the international soybean meal and soybean oil marketplace is severely in jeopardy at this point in time, and they do believe that many of the basic underlying factors are out of their control.

Mr. **FRENZEL**. Thank you very much.

I yield back, Mr. Chairman.

Chairman **GIBBONS**. Some of these Brazilian practices look like our practices.

Mr. **FRENZEL**. That is the trouble.

Chairman **GIBBONS**. They have got a—

Mr. **FRENZEL**. It must be worse than I thought.

Chairman **GIBBONS**. They have got a rural credits program that looks like ours. Ours does not have a 45-percent interest rate, but I realize that is not much interest in Brazil, where inflation may run 100 percent.

Mr. **FRENZEL**. That is a preferential rate.

Mr. **HAMMER**. In many cases we are discussing the magnitude of it and in many cases how it is applied.

Chairman **GIBBONS**. I will read it. I am glad that you have taken this action. Let us see where the chips fall.

Mr. **Hammer**. Thank you, Mr. Chairman. We feel really if you are suffering from trade problems and you do want the Government to assist you in it the 301 process is really something that the industry felt strongly they should avail themselves of.

Chairman **Gibbons**. I am glad you have done it. I think Mr. Frenzel is right, most of the problems began with ill-advised action in which we started embargoing oilseeds and then became a very unreliable supplier. Our actions on the pipeline and our actions in wheat and all those things are going to further undermine our reputation around the world as being an honest supplier. It is always amazing to me that we survive as well as we do when we look at all the mistakes we make.

Mr. **Hammer**. If you could amend the 301 process so we could complain about embargoes, we will put that in as well.

Chairman **Gibbons**. Thank you.

Harry Lamar, from Kensington, Md. That is an understatement. I hope you are not too embarrassed at how your students perform from time to time.

STATEMENT OF HAROLD T. LAMAR, KENSINGTON, MD.

Mr. **Lamar**. My name is Harold T. Lamar.

Chairman **Gibbons**. Hardly known to this committee.

Mr. **Lamar**. I appreciate very much the opportunity to be here. It has been some 10 years, Mr. Chairman, since I sat before this committee——

Chairman **Gibbons**. That long?

Mr. **Lamar**. I have resisted the temptation to come back and advise the committee for 3 years now. I would like the record to show that.

It has been 10 years since I sat before the committee surrounded at that time by a number of administration witnesses. We were considering in markup what became the Trade Act of 1974.

Chairman **Gibbons**. Yes.

Mr. **Lamar**. I wasn't always in agreement then with what the administration was proposing. One time you asked me, "Well, Harry, you keep saying the staff recommends this. The staff believes that. The staff disagrees. Who is the staff?"

Well, I looked, and there wasn't anyone around. I said, "Well, I guess it is me."

I am in the same position today. I am speaking on my own behalf.

The complaints of the business and labor communities about our trade statutes and the administration of them are very similar to those expressed 10 years ago. That they are the same does not make them any less serious, but we should recognize that many of the same issues were addressed in the Trade Act, and that should give you some perspective.

Very often the answer to these complaints is to do a better job in following the statutory policy in administering the trade statutes which are on the books.

For example, we have developed new terms or at least given new meaning to old terms in the discussion of trade policy in the last 2 years. Much has been spoken of the need for reciprocity and the need to deal with targetting of U.S. markets by foreign governments and exporters.

In 1974, the concept of sectoral reciprocity in trade negotiations was only reluctantly accepted by our trade negotiators as language to get the 1974 act passed, but as basically an idea which wasn't needed. We have found that there is a much greater need to examine and respond to the ever-evolving competitive pressures on our basic producing industries, pressures which often do not represent conditions of comparative advantage nor are they intended to better allocate United States resources.

I mention this, Mr. Chairman, because I believe that an examination of the Trade Act of 1974, in the light of the proposals pending in the Congress, reveals that Congress has directed the President to act, and the President has all the authority he needs to act effectively against any unfair trade practice involving U.S. goods or services, or investment related to trade in goods or services.

The question of the effectiveness lies with the discretion of the President, his willingness to use the provisions, and the adequacy of the documentation of the cases brought by U.S. interests.

I have mentioned the Houdaille case in my prepared remarks. Events may have well overtaken my comments on the case, but I still think this question is valid—What stronger and firmer message could the United States have sent our trading partners than that the United States will examine the alleged practices which are contrary to our own domestic law and limit tax advantages when imported products are introduced into the United States market under such practices as those identified in the Houdaille case.

The reaction and delay in this case is typical of the inability of U.S. Government agencies to make hard decisions when the decisions involve import restrictions. I have long felt that the United States has allowed itself to be forced into a false sense of embarrassment about taking trade actions which are needed domestically and which are based on recognized rights in international trade law.

To belabor the point, when a domestic industry brings a case for import relief there is great wringing of hands on all sides. The Council of Economic Advisors suddenly becomes a great friend of the consumer.

The decision of whether to impose import restrictions is often judged primarily in terms of the cost of the import relief to the consumer, per worker in the affected industry. There is never any analysis of the cost of replacing the producing units, the companies, the working skills. These factors have costs, too; and in some industries their costs may be very high indeed.

This sense of moral alarm has always attached to possible action under our escape clause or import relief provisions. This ambivalent attitude toward acting under article XIX of the GATT has been evident not only in the actions taken under the original escape clause, but in the various revisions which have been made in the criteria of the statute.

Having said this, I do not believe that section 201 of the Trade Act of 1974 needs extensive revision. However, I would like to suggest at least three provisions where the substance of the law could be strengthened to address some of the problem areas mentioned in the subcommittee hearing notice.

All too often we fail to recognize the original intent of the import relief under article XIX of the GATT and under the escape clause. The intent was to provide relief to remedy a serious injury caused by increased imports.

In our free trade/protectionist dialog on import relief cases, we invariably seem to forget that the import relief is to be temporary, and its only reason for being considered is to remedy serious injury from imports.

In many cases we overlook the reason for taking the remedial action because each case is discussed in terms of the United States destroying the entire free trade system. The United States should not permit itself, domestically or internationally, to be drawn into a discussion of whether it has the right to take temporary action to remedy serious injury to a domestic industry caused by imports.

I believe if we expanded the concept behind section 201(b)(5) of the Trade Act of 1974 we could improve the effectiveness of the import relief provision. I refer to the requirement that the U.S. International Trade Commission "for the purpose of assisting the President" in making his import relief determinations under section 202 and 203 should investigate and report on "efforts made by firms and workers in the industry to compete more effectively with imports."

That says in another way what the purpose of the import relief provision is.

The Commission has done very little with the requirement. I also was a little astounded today to hear the representative of the USTR testify that they had been looking very closely at the plans of workers and firms involved in import relief cases to become more competitive during the period that the import relief is imposed.

I don't believe that, at least I have not been personally aware that such a consideration has been given to import relief cases, at least over the past 20 years.

I believe the ITC is in a poor position to recommend relief if it has no idea of what actions the firms and workers in the industry plan in order to salvage their operations and their jobs.

Moreover, the President may find it hard to muster concern for industries and workers who merely are requesting protection from imports with little notion of how they will compete after the temporary import relief has ended.

I realize that this idea and approach is contained in legislation before the Congress. Senator Heinz has a bill, for example. I believe a much simpler approach than that contained in the Heinz bill would be sufficient.

I don't believe the import relief should be conditioned on workers and firms being required to provide a plan. I think a much softer approach could be effective. Raising the ITC preliminary injury finding to an art form could do violence to the import relief provisions and accomplish very little.

If the whole question of import relief could begin with the question of serious injury from imports and how the affected domestic producing groups can economically adjust to more effectively compete, the whole purpose of import relief can be better served.

As I say, Mr. Chairman, I do not believe that the criteria for defining serious injury or industry or the causal link between increased imports and the injury need to be amended. My experience tells me that every time we have amended the criteria for injury, the results have been unpredictable.

What we have is consistent with the GATT and can provide the relief needed. I think that any secondary guessing by the President on injury questions because of failures of industries such as automobiles to convince the ITC of serious injury is an extremely ill-advised change in the law.

Mr. Chairman, the antidumping and countervailing duty statutes are far too technical for comment by those not following casework daily. However, I can't resist one or two comments.

The most costly investigations for all parties concerned are the cost or production investigations. It is not all that clear that relief under the antidumping provisions has improved in frequency or in quality since cost of production was placed in the statute.

I think that with the benefit of hindsight, the cost of production amendments of the 1974 Act should have been given a lot more thought then forgotten.

A final thought, Mr. Chairman. I hope your effort to provide more effectiveness in the import relief statutes will not be caught up with yet another trade reorganization. I know you have asked questions about this before.

The last reorganization resulted in at least four rather than two agencies administering the antidumping and countervailing statutes, with a lot of lip service but a somewhat compromised leadership position for the U.S. Trade Representative.

There is a good deal of strength and institutional memory in the interagency trade organization. The institutional memory and experienced trade officials and negotiators are needed more and more.

While it has to be recognized that Congress cannot by statute decide whom the President will seek his advice from, the institution of the U.S. Trade Representative has given the Congress an effective voice in the development and administration of trade policy.

The balance that was struck in 1962 and strengthened in 1974 between Congress and the executive branch would be seriously diminished by the one trade agency proposals.

I would only add, administration witnesses always point to all of the practices by the United States in discussing the unfair trade statutes. In particular, under the countervailing duties statute, they refer to all of the moneys that are spent by the Department of Defense or NASA, moneys which do give our industries a competitive edge, whether it be in commercial aircraft or in all of the spin-offs from space research.

I think to represent this as part of the unfair trade practices picture is an erroneous depiction of what this country does as opposed to what other countries do. When the United States acted in the Michelin tire case, it did not act because the province in Canada was giving low cost loans and subsidizing a plant that was producing articles to be consumed in Canada.

The United States took actions because the moneys were to support the export to the United States of 90 percent of the production of tires from that plant. I think there is a great deal of difference in the Government's expenditure of money for space and DOD, from the other types of subsidies that other countries extend to their industries to compete in world markets.

Thank you very much, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF HAROLD T. LAMAR, KENSINGTON, MD.

Mr. Chairman, I appreciate very much the opportunity to appear before the Subcommittee on Trade of the Committee on Ways and Means. It is with a sense of deja vu that I approach testifying, it being some ten years since the Committee held similar hearings to consider recommendations to change domestic trade law in order to restore the confidence of the American business community in the government's willingness to deal with trade problems in a fair and balanced manner.

Obviously, the need to restore the confidence of the American business community in the efficacy and in the administration of U.S. trade law has returned. The amendments to the trade law of the 1974 Act and the great promise of GATT reform and new trading rules have not worked as had been hoped.

We have developed new terms or at least given new meaning to old terms in the discussion of trade policy of the last two years. Much as been spoken of the need for reciprocity and the need to deal with targetting of U.S. markets by foreign governments and exporters.

In 1974 the concept of sectoral reciprocity in trade neogtiations was only reluctantly accepted by our trade negotiators as language to get the 1974 Act passed but as basically an idea which wasn't needed. We have found that there is a much greater need to examine and respond to the ever evolving competitive pressures on our basic producing industries, pressures which do not represent conditions of comparative advantage nor are they intended to better allocate United States resources.

I mention this, Mr. Chairman, because I believe that an examination of the Trade Act of 1974, in the light of the proposals pending in the

Congress, reveals that Congress has directed the President to act, and the President has all the authority he needs to act effectively against any unfair trade practice involving U.S. goods or services, or investment related to trade in goods or services. The question of the effectiveness lies with the discretion of the President, his willingness to use the provisions, and the adequacy of the documentation of the cases brought by U.S. interests.

Much has been said about sending our trading partner a message. It has been some time since so obvious a case for sending a messeage has been presented as exists in the Houdaille case. Certainly if section 103 of the 1971 Tax Act was proposed as a new piece of legislation most of us would reject it as inconsistent with both "good" trade law and "good" tax law. Nevertheless, it is on the statute books. The practices of the Government of Japan and of the cartelized Japanese machine tool producers are almost completely documented in terms of the issues addressed in the legislative history of the tax statute. With all the flexibility in the world the President can withhold the investment tax credit from the subject machine tool imports for such period of time as is necessary to obtain a response from the Japanese Government. What stronger and firmer message could the United States send than that the United States will examine the alleged practices which are contrary to our own domestic law and limit tax advantages when imported products are introduced into the United States market under such practices as those identified in the Houdaille case?

The reaction and delay in this case is typical of the inability of U.S. government agencies to make hard decisions when the decisions involve import restrictions. I have long felt that the United States has allowed itself to be forced into a false sense of embarrassment about taking trade actions which are needed domestically and which are based on recognized rights in international trade law.

To belabor the point, when a domestic industry brings a case for import relief there is great wringing of hands on all sides. The Council of Economic Advisors suddenly becomes a great friend of the consumer. The decision of whether to impose import restrictions is often judged primarily in terms of the cost of the import relief to the consumer, per worker in the affected industry. There is never any analysis of the cost of replacing the producing units, the companies, the working skills. These factors have costs, too; and in some industries their costs may be very high indeed.

This sense of moral alarm has always attached to possible action under our escape clause or import relief provisions. This ambivalent attitude toward acting under Article XIX of the GATT has been evident not only in the actions taken under the original escape clause and successor provisions, but in the various revisions which have been made in the criteria of the statute.

I do not believe that section 201 of the Trade Act of 1974 needs extensive revision. However, I would like to suggest at least three provisions where the substance of the law could be strengthened to address some of the problems areas mentioned in the Subcommittee hearing notice.

All too seldom do we consider the orginal intent of import relief under Article XIX of the GATT and under the escape clause. The intent was to provide relief to remedy a serious injury caused by increased imports. In our free trade/ protectionist dialogue on import relief cases, we invariably seem to forget that the import relief is to be temporary, and its only reason for being considered is to remedy serious injury from imports. We overlook the reason for taking the remedial action because each case is discussed in terms of the United States destroying the entire free trade system. The United States should not permit itself, domestically or internationally to be drawn into a discussion of whether it has the right to take temporary action to remedy serious injury to a domestic industry caused by imports. If quick action were taken in a few cases there would be fewer cases developed in which the amount of trade becomes so great as to require purely political decisions which usually result in actions little related to remedying the original serious injury.

Like import relief we have tried adjustment assistance, and just as half-heartedly. However, I believe that if we expanded the concept behind section 201(b)(5) of the Trade Act of 1974 we could improve the effectiveness of the import relief provision. I refer to the requirement that the U.S. International Trade Commission (ITC) "for the purpose of assisting the President" in making his import relief determinations under section 202 and 203 (of the Act of 1974) should investigate and report on "efforts made by firms and workers in the industry to compete more effectively with imports".

The Commission has done very little with the requirement. Some have argued that workers and firms in injured industries are in no position to plan how better to compete with imports. I believe the ITC is in a poor position to recommend relief if it has no idea of what actions the firms and workers in the industry plan in order to salvage their operations and their jobs. Moreover, the President may find it hard to muster concern for industries and workers who merely are requesting protection from imports with little notion of how they will compete after the temporary import relief has ended.

I recommend that section 201(b)(5) be amended to place a responsibility with the petitioning industry and its workers to provide the ITC with the plans of the firms and workers to more effectively compete with imports in conjunction with the import relief sought in the investigation.

As a part of this new emphasis of more effectively providing import relief as a remedy to the serious injury from imports in connection with the efforts of the firms and workers to more effectively compete, I also recommend-that the responsibilities of the Secretaries of Commerce and Labor under section 202 be directed specifically at assisting and, if appropriate, implementing economic adjustment efforts of the industry and workers toward improved competitive capabilities.

If the whole question of import relief could begin with the question of serious injury from imports and how the affected domestic producing groups can economically adjust to more effectively compete the whole purpose of import relief can be better served.

In section 202(c) of the Trade Act of 1974 there are nine categories of considerations the President is to take into account in determining whether to provide import relief and what method and amount of import relief he will provide. In the context of competition in today's market place there is another consideration that the President should take into account. In this climate of smokestack industries and high technology the President should consider if import relief is needed to maintain an adequate domestic production base for the products of the seriously injured industry. This is not a question of national security. It is, however, a very important part of the national interest question which section 202 poses for the President.

In an atmosphere where targetting of industrial markets is commonplace, there should be room for the President to consider whether his action or lack thereof will determine the maintenance of an adequate production base for the products produced by the seriously injured industry. It may wellbe that technology and evolvement of competitive forces are such that the maintenance of an adequate domestic production base is not relevant. It could also be the case that the import relief available is insufficient to remedy the serious injury.

I recommend that section 202 be amended to require the President to take into consideration whether an adequate production base can be maintained if import relief is not provided.

Finally, I would recommend that the President be authorized to provide emergency import relief in much the same manner he is authorized to provide emergency relief under section 22 of the Agricultural Adjustment Act. Section 201 could be amended to provide that a petitioner could request emergency action by the President, based on good cause shown regarding the emergency nature of the serious injury or threat, and with referral to the U.S. Trade Representative, the President could take temporary action pending completion of the ITC investigation. I would propose no criteria in the law other than require a showing that the serious injury or threat is imminent, requiring immediate action.

Mr. Chairman, I do not believe that the criteria for defining serious injury or industry or the causal link between increased imports and the injury need to be amended. My experience tells me that every time we have amended the criteria for injury the results have been unpredictable. What we have is consistent with the GATT and can provide the relief needed. I think that any secondary guessing by the President on injury questions because of failures of industries such as automobiles to convince the ITC of serious injury is ill-advised.

Mr. Chairman, the antidumping and countervailing duty statutes are far too technical for comment by those not following casework daily. However, I can't resist one or two comments.

My overriding memory of the Committee drafting of title VII of the Trade Agreement Act of 1979 was that we were providing far too many opportunities for judicial review of agency actions. It seems to me that one final opportunity for judicial review of agency determinations is sufficient for both provisions of law.

Secondly, the most costly investigations for all parties concerned are the cost of production investigations. It is not all that clear that relief under the antidumping provisions has improved in frequency or in quality. I think that (with the benefit of hindsight) the cost of production amendments of the 1974 Act should have been given a lot more thought then forgotten.

A final thought, Mr. Chairman. I hope your effort to provide more effectiveness in the import relief statutes will not be caught up with yet another trade reorganization. As I view it the last reorganization resulted in at least four rather than two agencies administering the antidumping and countervailing statutes, with a lot of lip service but a somewhat compromised leadership position for the U.S. Trade Representative.

There is a good deal of strength and institutional memory in the interagency trade organization. The institutional memory and experienced trade officials and neogtiators are needed more and more. While it has to be recognized that Congress cannot by statute decide who the President will seek his advice from, the institution of the U.S. Trade Representative has given the Congress an effective voice in the development and administration of trade policy. The balance that was struck in 1962 and strengthened in 1974 between Congress and the Executive Branch would be seriously diminished by the one trade agency proposals.

It has been an honor for me to have this opportunity to present this Subcommittee on Trade with some of my thoughts on import relief. Thank you for all your courtesies.

Chairman **Gibbons**. I basically think that if through our defense activities we injure somebody else, that maybe we have a responsibility, but that is pretty remote from the purpose for which the expenditure was undertaken.

But if you develop a particular product just to capture someone else's market, well, that is an entirely different operation. You undertook it for the purpose of economic aggression.

I tend to discount those arguments, too, Harry. What do you think about this so-called furniture shuffling that they are going to do on trade? You seem to think it is going to be more than furniture shuffling.

Mr. **Lamar**. I do, Mr. Chairman. As I indicate, there is great strength in the interagency trade organization under the USTR. To change the setup and have a one trade agency, I think, will not make the administration of the laws more effective.

It may result in some dimunition of some domestic commerce personnel of the number of trade advisors in Treasury, in Labor or Interior—obviously not Agriculture—but sooner or later the constituent bodies of those Departments will see to it that they have a much stronger voice in trade policy after the reorganization has been in effect for a couple of years.

I believe that the interagency organization is a very effective one. I think there is something very healthy about the fact that the Departments do have an input into the final decision, the important decisions in the trade policy arena.

I would also like to point out that much of the overlap and the ineffectiveness of trade policy decisions have been in the area of East/West trade and agriculture, that is, the grain embargo, in which I believe if the USTR was consulted before that embargo on soy beans was put into effect, he was consulted 6 hours before it is announced. Thus it is in agriculture and in the field of East/West trade where probably the USTR does not have a strong enough voice, and where there is an overlapping would not be be corrected by the one trade agency.

So in those two areas not much would be changed with a one Department setup. Those are the very ones that many people cite as a need for a one Department trade agency.

Chairman **Gibbons**. I hadn't thought about that. I notice the President says he wants us to speak with one voice, and in our

Government, he is really the only person that can speak with one voice.

Mr. **Lamar**. Right.

Chairman **Gibbons**. The Congress can't, and certainly his cabinet can't, because any trade decision is always going to be competing with a security decision or with an international political decision, and yet—well, I don't know what to do with the problem.

Of course, I don't know whether Mr. Frenzel and I will get much chance to work on it or not. We have still got a problem here.

You mentioned that there were now four agencies administering the countervailing and antidumping laws. Do you want to expand a little more on that?

Mr. **Lamar**. Well, previously, of course, it was administered by the Treasury Department, U.S. Customs Service, and with USITC making the injury decision. When the responsibility for administering the statutes was transferred to the U.S. Department of Commerce, Customs was still on the front line dealing with the import documents, being responsible for withholding liquidation and so forth.

The Commerce Department assumed responsibility for the investigations. The ITC was still responsible for the finding of injury or lack thereof.

Of course, the U.S. Trade Representative was supposed to be responsible for conducting negotiations when those became necessary in antidumping cases. This hasn't turned out to be true, but at least it was the understanding and a part of the legislative history of the Trade Act.

Chairman **Gibbons**. We had Commerce conducting the negotiations on steel; didn't we?

Mr. **Lamar**. Yes, we did.

Chairman **Gibbons**. We have got this so mixed up.

Mr. Frenzel?

Mr. **Frenzel**. Harry, thank you very much for your usual good advice.

In your using the Houdaille case, as an example, you suggested that a strong and firm message should be sent by the United States that it will examine the alleged practices which are contrary to our domestic law.

Does that mean that you think the executive made the wrong decision on Houdaille?

Mr. **Lamar**. Yes, I do, Mr. Frenzel. I believe from what I have been able to learn, while it wasn't a perfectly prepared case, the case was very well prepared and it was an excellent description of the process that the industry in Japan and the Government agencies went through to provide the industry with the best competitive edge that they could devise.

I think that was well documented in that case. To my mind, not being a lawyer, I have no compunction about saying it, I think it violated the practices, violated our own antitrust laws in terms of dividing up domestic markets. We have spent the past 2 years talking about sending our trading partners a message about reciprocity and unfair trade practices, and I guess "we are mad as hell as we are not going to stand for it anymore," but in this one case the President could have acted for even a day or a week or 6 months announced that he was acting under this provision to withhold the application of the investment tax credit from these imports.

To my mind, that would have gotten the Japanese's attention very quickly.

Mr. **Frenzel.** You don't think telling them they can't ship any more autos got their attention?

You don't think that is a very severe step for this country to have taken?

Mr. **Lamar.** It was certainly a very serious step. It is one in which I did not concur, but nobody asked me.

Mr. **Frenzel.** Me, too, but it happened. How about telling Europe that they can't ship any more than whatever it is, five and a fraction percent of the steel coming into the country?

It seems to me those are fairly serious actions taken by this country, since they lock up an enormous portion of our market from penetration, however competitive from abroad. I don't know how we could speak in any stronger voice than that.

I think they were mistakes, both of them, but it seems to me Houdaille would be a minor step compared to those two, if we want to flex our muscles.

Mr. **Lamar.** Well, I think the origin of those actions came from a slightly different arena that I was speaking of, and that was the efforts to pass reciprocity legislation to somehow legislatively redress the trade conditions under which the United States can get a more fair shake in the world markets.

Certainly those were very serious steps. I am not quite sure what authority the President acted under in getting the Japanese to impose voluntary limitations on exports of automobiles.

Mr. **Frenzel.** First, the Japanese did it voluntarily, so he needed no authority. As you understand the Jack Danforth bill, do you think that improves the situation and is worthy of passage?

Mr. **Lamar.** No. I don't believe it should be enacted. I have become concerned, Mr. Chairman, when we try to define in trade law some of these concepts. I sincerely believe that the President has all the authority he needs to act in section 301.

Whether it be in trade in goods or trade in services or in investment, trade related investment, I think he has full authority to act. We really haven't had all that many cases under section 301, not enough successful ones, anyway.

Mr. **Frenzel.** I agree we haven't. How did you like the Kawasaki thing?

Mr. **Lamar.** Well, I hope that—you mean the Harley-Davidson?

Mr. **Frenzel.** Yes.

Mr. **Lamar.** I hope that that firm does have good plans to become more competitive during the import relief period. That case has been around for a long time. I was rather puzzled that part of the domestic industry is made up of two Japanese producers of motorcycles in this country.

I don't think it really represents the millennium in terms of favorable findings by the International Trade Commission in relief cases.

I think if we are going to really "burden" some other U.S. industry because of the import relief action that we could have chosen better than motorcycles.

Mr. **Frenzel**. Well, do you think it established new grounds for the ITC?

There are some thoughts that it probably did.

Mr. **Lamar**. Well, I think Trade Commissioners change from time to time, and the impact of one case in indicating the outcome of future cases insofar as that body is concerned is not a very sure thing.

Mr. **Frenzel**. I was interested in your statements on reorganization. Do you think the last reorganization was not a positive one?

Mr. **Lamar**. No. I do not.

Mr. **Frenzel**. The results of it were not positive?

Mr. **Lamar**. No. I realize that, indeed, this subcommittee had something to do with the attitude that the Treasury Department was almost refusing to administer the Anti-Dumping Act and the countervailing duty provision.

I think that was erroneous.

But I don't see any great improvement in its administration. I think it was unfortunate in that the role of the U.S. Customs Service in the dumping cases can be a very important one, since these are the people on the line.

They have the most knowledge about imports, and yet you have now the investigators in a completely different department. I think that is bad government.

Mr. **Frenzel**. I think you make a good point that the Senator Roth bill does not do anything to lessen the influence of Defense and Agriculture. All it does is swallow up STR.

Mr. **Lamar**. I think the Congress might pass a law requiring that every new OMB Director take a course in the meaning—the history and the tradition of the U.S. Office of the Trade Representative in order that when they come onboard and see that big budget of some 110 individuals, they understand just why it is there.

Mr. **Frenzel**. I think we ought to give that to Presidential advisers before the OMB Director is selected.

Chairman **Gibbons**. Why not just give them a copy of article 1, section 8, clause 3 of the Constitution?

Mr. **Frenzel**. Then nobody would be willing to serve.

I thank the witness. It is certainly nice to have you back with this committee.

Mr. **Lamar**. Thank you very much.

Chairman **Gibbons**. We appreciate you coming. It was interesting. We have missed you.

Our next witness is Peter D. Ehrenhaft. Go right ahead.

STATEMENT OF PETER D. EHRENHAFT, PARTNER, HUGHES, HUBBARD & REED, WASHINGTON, D.C.

Mr. **Ehrenhaft**. I appreciate this opportunity to appear before the committee. I was particularly gratified to hear Harry's comments that perhaps he was wrong in making me the last Deputy Assistant Secretary of the Treasury before the last reorganization and that some of the abuse heaped on my old agency was perhaps misguided.

In starting out, I would like to associate myself with a comment that has been attributed to Congressman Frenzel and reported elsewhere.

He said that he thought that this would be a good Congress if it does nothing in the trade field during the current session. In part, the burden of my testimony is going to be that, before you make any further changes in the Trade Agreements Act or any other facet of our trade law, the Congress should order a study in depth of what our trade remedies, in fact, have done and what they do to our trade posture.

I am terribly concerned that over the years we have constantly tinkered with this facet, that facet of our trade law, but we have no idea of what, in fact, these trade remedies do.

When I was at the Treasury, I was asked how much do we collect in antidumping duties and how much do we collect in countervailing duties. I promised, at that time, Senator Long, that I would provide that data shortly.

In 2 years of service, I was unable to come up with those facts. And I would dare say if you were to ask someone at the Customs Service to give you that information today, they also could not provide it.

There is no way that those simple facts are known, much less the more complicated facts as to what effect on labor, investment displacement and so on occurs when these remedies are invoked.

To illustrate, Mr. Ervin commented about the section 201 trade cases. He said there were something like 48 cases that were considered by the ITC. But I think in analyzing those numbers, you need additional facts as well, because, if closely examined, we would find there were not 48 cases, but perhaps 16 or 18 cases, 4 or 5 that related to mushrooms, 4 or 5 relating to specialty steel, or to footwear. Though separately numbered, those are the same cases, brought over a period of time. I don't think are properly regarded as separate entities in analyzing the effectiveness of the statute. One needs that kind of organization of facts to understand what the law does.

I am also very familiar with the auto case that was discussed here, since I represented Ford in that proceeding before the ITC.

Again, I would have to associate myself with Harry's remark that I don't think that the motorcycles case necessarily portends a whole new situation at the ITC. Much of that depends on who the commissioners are at a particular moment.

My point here is that now there are reports that have suggested that we need a further investigation of what the relief measures that are recommended, in fact, do for the industry. I quote in my prepared testimony a report in the Wall Street Journal that the voluntary restraint agreement may have, in fact, adversely affected the American automobile industry by encouraging the Japanese to sell in the United States more of the high valued, larger cars on which the Americans previously made their biggest profit margins.

Those kinds of facts are facts that are presently unknown. Therefore, I do urge the committee to ask the GAO to conduct such a study, or perhaps, you would do so independently. But I know that the GAO would be willing to do so. They have done excellent studies of the antidumping duty laws in the past, and hopefuly could provide assistance, to you in that regard.

The second thought that I would like to share with you is to urge the committee and others in the Congress not always to talk about trade as though it were a terrible calamity to regard imports as something like a hurricane that we have to do something about.

I think that imports are a fact of life that the American industry and American consumers and the American economy have to adjust to.

There are particular unfair trade measures that are undertaken by foreign governments. We ought to respond to those, and the countervailing duty law, I believe, is an effective and useful kind of a remedy in that regard.

I am much less persuaded that the antidumping law, for example, or that some of the other laws aimed at the kinds of practices about which complaints are heard, are more than efforts to secure for failing companies some measure of relief from the oncoming tide that, in fact, cannot be stopped.

In my longer prepared testimony, that I hope you will include in the record, there is a discussion of the slide rule industry in the United States, which disappeared in 18 months after the invention of the hand-held calculator. Nothing was done with regard to the slide rule producers of America. There was no help given to them when their investment became worthless, their workers were unemployed. Technological innovation simply overwhelmed them. But they had to adjust.

In many cases, imports ought to be regarded as a similar phenomenon. Efforts ought to be made to help workers find new employment rather than try to keep out the imports that eventually will come in some way.

My third main point is that it is my belief that trade remedies should be pushed more into private hands. Many of these disputes are between private companies concerning who has the right of access to the market. It seems to me that the private companies ought to argue about that in a court, and if a company can demonstrate that it was damaged by an unfair act, it ought to recover the damages for that injury that it suffered.

I wonder why we should insist that Government agencies champion all the American industries who contend that they are injured by foreign interests? Frequently it puts the Government in a very difficult position.

You have been discussing this morning this problem of the "political" impact on the trade administrators. If I just could take a moment to do so, let me talk about one case that put that issue most poignantly when I was at the Treasury. We had the case of countervailing duties on olives from Spain. California growers contended that the Spanish growers received a subsidy calculated at 2.5 percent. At the same time, the Spanish Government told the State Department that if a countervailing duty were to be imposed on Spanish olives, it would be difficult for the Spanish to agree to a renewal of the lease of the submarine base in Spain.

We told the Spanish ambassador that we were very sorry, but there was nothing that we could do about the submarine base. If a countervailing duty must be applied, it must be applied.

Other agencies in the Government urged the Secretary that something had to be done. But we did apply the countervailing duty, and they didn't close the base. So it might have been a lot of bluster. But it could have had an impact on the security of the United States. I wonder whether that is a sensible way for us to deal with our national security policies. It might be more appropriate if California olive growers have a complaint about the Spanish olive growers that they obtain a remedy through a proceeding in court.

[The prepared statement follows:]

STATEMENT OF PETER D. EHRENHAFT, WASHINGTON, D.C.[*]

SUMMARY

My name is Peter Ehrenhaft. I am a practicing lawyer in Washington and served as the Deputy Assistant Secretary of the Treasury for Tariff Affairs from 1977 through 1979. We worked together then in drafting the Trade Agreements Act. It is a disappointment that so soon after that law became effective, you feel compelled to look at it again.

My testimony may surprise you. I will not provide you with many suggestions for fine tuning changes in the law, although I will comment briefly on some of the ideas the Administration is considering. I have much more basic notions I want to share with you:

First, do not be pressured into doing something new now. Before any further tinkering is done with our already enormously complicated trade remedy machine, take a year or two for a serious and comprehensive study on what our existing laws have done and can do. No one knows. Sloganeering passes for facts. Find the facts before you act. Last Friday's Wall Street Journal has a piece suggesting that the so-called voluntary restraints on auto exports we persuaded the Japanese to adopt may, in the end, have been more profitable for them and more counterproductive to the U.S. industry than total non-intervention by the U.S. Government. Is this true? If so, in how many other cases have similar unpredicted results occurred? You ought to have a clue. You have none now.

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[*] Partner of Hughes Hubbard & Reed; Deputy Assistant Secretary and Special Counsel (Tariff Affairs), U.S. Department of the Treasury (1977-79).

Second, stop thinking about trade as a calamity. Our trade relief laws look at imports as though they were hurricanes. Think about imports as but one manifestation of the inevitable process of change. Imports are often no different than technologically new products. The right response ought to be a humane and efficient process for adjusting our work force and investments to that change. We should not build dikes against unstoppable waves.

Third, reduce the role of the government in trade disputes. Most of the disputes about which you hear relate to access to the marketplace. Who will have that access and under what conditions? It should be the role of governments to establish the rules and to provide forums in which disputes about compliance with them can be settled. It need not be the role of governments to champion the rights of individual competitors. Consider shifting to investors and workers both the right and obligation to pursue their complaints about the behavior of their competitors through the same procedures they follow in protecting their domestic rights -- through litigation. They then both bear the costs and collect the damages.

As indicated, I have also included some comments concerning some of the changes the Administration is proposing. Basically, they are:

a. Limit, if not abolish, interlocutory judicial review of decisions by the ITC and ITA. The judicial review permitted by the Trade Agreements Act exceeds traditional bounds, is unnecessary and has proven wasteful to all concerned.

b. Regularize the procedure for issuing administrative protective orders. The protective order concept was a significant reform of the TAA. But as interpreted by the Court of International Trade, it has often become unworkable in view of the short statutory time periods within which the agencies must review voluminous records before issuing such orders on a case-by-case basis. Although regulations could solve the problem, legislative blessing for routine protective orders covering certain usual submissions might be useful.

c. Take a new look at Section 751 annual reviews. These are the most important reform of the TAA. But they have become bogged down in endless relitigations of the initial investigations. Adopt a firm "law of the case" rule -- but accompany it with a mandatory "sunset," terminating orders after, say, three years. Permit sampling and averaging with a view to calculating a flat percentage duty by product and importer for antidumping cases, applicable to all future imports, instead of current to-the-penny and after-the-fact assessments. But do not limit adjustments to prices being compared: They are the heart of fairness in this statute.

d. Don't abandon the efforts initiated by Treasury in the late 1970's to adopt a reasonable rule for coping with imports from so-called non-market economies. The simulated constructed value approach we devised was critically examined and supported by a lengthy investigation by the General Accounting Office. While not perfect, it is the "least worst" alternative for a tough problem.

STATEMENT

My name is Peter Ehrenhaft. I am a practicing lawyer in Washington. As a number of the members of this Committee recall, I spent a good deal of time before you in 1978 and 1979, when I served as the Deputy Assistant Secretary of the Treasury for Tariff Affairs. We worked together then in drafting the Trade Agreements Act. We gathered in the Rose Garden to observe President Carter sign what we all thought was a good law. It is a disappointment that so soon after that law became effective, you feel compelled to look at it again.

My testimony may surprise you. I will not provide you with many suggestions for fine tuning changes in the law. I share your dissatisfaction with its workings. And I will, at the conclusion of my submission, comment briefly on some of the ideas that my successor, Gary Horlick, and his colleagues are considering that do make some modest alterations in the legislation now on the books. But I have much more basic notions I want to share with you:

First, do not be pressured into doing something new now. Before any further tinkering is done with our already enormously complicated trade remedy machine, take a year or two for a serious and comprehensive study on what our existing laws have done and can do. No one knows. Sloganeering passes for facts. Find the facts before you act.

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*/Partner of Hughes Hubbard & Reed; Deputy Assistant Secretary and Special Counsel (Tariff Affairs), U.S.Department of the Treasury (1977-79).

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Let me now develop these points.

A. Background

When serving in the last Administration, I was the administrator of the antidumping and countervailing duty laws and a principal negotiator for the United States of the GATT Antidumping and Subsidies Codes. I was one of the architects of the steel "trigger price mechanism." Having participated so actively in the creation of these elaborate rules, you might assume I would be one of their principal apologists. In fact, my thesis today is that the efforts going into the adoption and proliferation of these rules has kept our minds off what we really ought to be doing to solve the problems of our economy. I have come to suspect that our legal rules may impede, rather than facilitate, the creation of the healthy trading system we want.

Why is that so? There are a number of reasons which, while obvious, are worth recalling.

First, we happily live under a democratic government. But in such a system, there is an inherent bias against long-term economic solutions. They simply take longer than the time between most elections. No one needs to tell you of the tyranny of two-year terms of office. In that milieu, it is inevitable that the "quick fix" is the only solution the public demands and that candidates are forced to espouse. That consideration is always at the front end of solutions offered for our economic problems, although it should not be.

Second, it is a fact of political life that whether you are running for office or trying to stay there you are always better off promoting an initiative, rather than looking at past programs or conceding "benign neglect" may deal with a problem. You cannot leave matters alone; you must "do something." It is the only way one develops name recognition. It is an atmosphere in which foolish measures often become "law."

Third, we live in a world of rising expectations and demands for instant gratification. We expect the government to prevent unemployment, provide social security, assure not only subsistence but the good things of life. We want it all very quickly and cannot wait for even two years. That is one of the problems with our trade laws. They were most recently amended in 1979 with great publicity and promise to the American people. The laws, we said, would rapidly provide stability to protect our markets from predatory and unfair acts by others. They would restore American economic supremacy. That kind of rhetoric encouraged expectations for instantaneous results. We have created in our trading system a demand for, and a belief that it is possible to achieve, quick solutions to trade problems. It is my personal view, however, that most of our trade problems cannot be solved by the kinds of remedies that the trade laws contemplate -- and surely not with the speed you are urged to demand.

Fourth, we operate a world trading system built on 40-year-old premises of stability and moderated change. But those premises are not as widely accepted today as they were when first adopted. For one thing, most of the rules were adopted at our initiative by countries such as those that comprise the EC. If all the world were like that group, we could perhaps more easily solve our problems. But there are so many newcomers with different cultures and values. Their demands are impossible to escape. The old system has not kept up with the pace of change.

If you agree with my observations -- not very startling ones to be sure -- where do they lead?

B. Recommendations to the Committee

1. Get the facts.

Before the law is changed again, it should be useful for this Committee to obtain some facts. You hear domestic industries complaining that before antidumping duties can be imposed, foreign sellers are rapidly shipping merchandise into the country to "beat" the onset of withholding. No matter how accelerated the procedure, and despite the fact that duties may now be applied retroactively in "critical circumstances," you are asked to reduce still further the periods of investigation and to make still more arbitrary the difficult decisions our law requires. At the same time, you hear foreign suppliers claiming that the mere initiation of a proceeding "chills" trade; that its successful completion "freezes" it.

You have no way of knowing who is right. You have no way of really knowing what any antidumping order ever issued has done to the trade in the commodity to which it applied. You cannot find out whether antidumping duties were collected on that merchandise or how much duty has been collected. The Customs Service has been trying to figure out a way to gather that information ever since I asked the question in 1978. They still don't have an answer!

Before you think of changing the law again, this Committee ought to commission a serious study of the trade laws and their effect. The GAO has made some beginnings, but much more is needed. You should know what happens when a proceeding begins. Does the trade in the affected goods slow down or is there a "rush" of imports? What about substitute merchandise? Is the trade scene a huge balloon -- when pressed at one point, it just expands at another? Do similar goods from other countries enter instead? Do other goods from the same producers enter? When we tried to limit the importation of foreign automobiles, we stressed the competition of Japanese-made small and inexpensive cars. But the "voluntary restraint" agreement appears simply to have pushed the Japanese producers into sending us their larger and more expensive vehicles that, in many ways, provide even more serious competition to our industry than cars in the lower end of the size/price spectrum. And for how long are the effects of trade restraints felt in the market? Do the U.S. industries revive from the "injury" the imports were found to have caused?

Why is it so difficult to find out the facts? There are a number of good reasons. First, the merchandise affected by one of our trade proceedings does not necessarily -- in fact it usually does not -- coincide precisely with the Item numbers in our tariff schedules. The products may be a subgroup or overlap a number of TSUS Items. However, our Customs Service keeps the statistics only in terms of TSUS numbers that do not isolate the products subject to trade relief orders.

Second, no instructions have been given to the Service to ascertain the exact amount of antidumping and countervailing duties it collects each year, either in the form of estimated or actual duties, on a case-by-case basis. Only aggregates are collected. The reasons offered for this lack of fact-gathering are wholly unpersuasive.

Third, the customs numbers are unrelated to the Census Bureau's Industry Codes. Therefore, it is very difficult to relate the information on imports into data on domestic production and sales.

Fourth, it is even more difficult to try and isolate the effects of antidumping and countervailing duty orders on the health or adjustment processes of domestic industries. Our economists' techniques may not be up to the task, particularly as the market tends to be dynamic, with new products entering all the time, with prices -- particularly those that must be translated from foreign currencies -- fluctuating constantly. The laws are built on a static model of stable prices and immovable relationships -- a model that bears little relationship to the real world.

Fifth, as Peter Drucker persuasively argued in the Wall Street Journal a few weeks ago, no one dares look at the adverse impact our import restrictions have on our export capabilities. We need to promote our exports by enhancing the competitiveness of our industries. We rarely do that by sheltering the firms complaining about import competition. But we put our heads in the sand before facing that dilemma.

Sixth, we never consider what good antidumping, countervailing and all other kinds of duties do to secure our economy in the face of the roller coaster on which the international value of the dollar rides. Its changes overwhelm in a month -- if not even a day -- duties laboriously computed in these proceedings. It is hard to find a duty order equal to 25% *ad valorem* under the Trade Agreements Act. Yet the Japanese yen, the French franc, the British pound have all fallen by such percentages during the past two years. That fact makes a mockery of longwinded negotiations on tariff rates at the MTN, no less than of the judicialized proceedings in which we engage before we impose special trade relief duties.

All these problems notwithstanding, with effort, sense and resources, important facts could be pulled together. They should be before you when you consider changing the law again.

2. If you can't (or shouldn't want to) beat 'em, join 'em.

You have heard speeches describing the underlying thesis of the trade laws summarized in the slogan "There's no free lunch." Although we nominally appreciate the "bargains" of low priced imports, we worry that foreigners will "capture" our market and then raise prices to unconscionable levels.

But have you every been shown a convincing case in which that has occurred or was in danger of occurring? I have not.

Even in the case of color television sets, in which foreign suppliers do seem to have "captured" most of the U.S. consumer market, it is hard to demonstrate that those suppliers are not delivering all the goods we want -- at continued low prices. As consumers we should welcome such low-priced goods from reliable suppliers. The money we save can be used to acquire other goods and services, to build up export industries and presumably enhance life for us all.

I suggest that it ought to be worth your while to consider whether we should spend less time in fighting off imports rather than accomodating to, and building on, them.

As a point of departure, I will mention that not long ago, purely by accident, I happened to sit on an aircraft flight next to a gentleman who told me that his business had been making slide rules. You all remember slide rules -- those old wooden things that we used in school to calculate percentages and sines as recently as the 1950's. His company had been very successful, his firm's beautiful slide rules were masterfully created, beautifully packaged in leather cases and kept by their owners as instruments of great value. But this gentleman's business was rendered obsolete in 18 months by the introduction of electronic hand-held calculators. His work force was discharged, his company's buildings sold, and his investment rendered worthless. He told me that there is nowhere in the United States or Europe today where a slide rule is made, unless as a curiosity or as a toy. As far as industrial utilization is concerned, slide rules do not exist. His business fell prey to a new product which totally superseded the old in everything the old did, but much more quickly and more accurately. And even more cheaply. Yet there was no way that the slide rule makers could make hand-held calculators. The technology was totally different. The distribution network was totally different. A real economic disaster occurred in that industry. But no one in the United States stood up to take care of, or even try to help, the slide rule makers. We had no program to do anything about their dilemma, except that of unemployment compensation for the workers. There was no program to help the investors find alternative resources or alternative allocations of their investments. We do have programs that help people out in natural disasters, such as a flood. We have government programs, such as the rules that were created in the Multilateral Trade Negotiations to help out when a trade "disaster" allegedly occurs. We compare trade with a calamity. Instead of seeing it as a benefit to our economy, we compare it to a flood. That, I suggest, is a very unfortunate kind of result. It treats trade, instead of as inevitable change -- such as a technological development -- as an unnatural happenstance.

Let me suggest to you that the difference between slide rules and steel sheets is really only one of quantity, rather than of quality. The problems that confront us in trade today, particularly in the "traditional industries" that most vocally seek your help -- steel, textiles, footwear -- are really "slide rule" cases.

The truth is that it is, of course, much harder to stand fast against the demands of 150,000 steel workers than 150 makers of slide rules. I recognize also that you face a big problem if you have to say to the people in Youngstown, Ohio, who have built churches, schools, parks and so on -- "Dear Folks in Youngstown, you are obsolete, please all move to Albuquerque and make silicon chips." It's very hard for everybody in Youngstown to get up and move to Albuquerque. One cannot lightly sacrifice the parks, the schools and churches and, above all, the feeling of community that make up the quality of life that have made cities where some of these obsolete industries exist very happy environments for many years. Nevertheless, the notion that one is going to preserve Youngstown in its traditional form because it has the churches and schools and parks, and because its residents -- and we, too -- want to keep their quality of life, is, I think, somewhat akin to King Canute's commands to the waves to stop, when there is no possibility that those waves will stop.

When you look at it closely, the only other possible differentiation between slide rules and steel sheets may be that our national security requirements may require us to produce some steel sheet in the United States. But, frankly, I am not really persuaded that by producing obsolete products or using outdated processes for making what we now need, we better assure our national security. I think that arms control and a healthy world economic order are more likely to provide security than the continued production of items on uneconomic bases.

The prescription that I have is that from the government as a participant we need much more emphasis upon how it can induce sensible change and how our societies can cope with such change humanely. We need that much more than new measures to preserve the plants and jobs that now exist. In making that suggestion I don't believe that governments are going to be the most appropriate allocators of resources for adapting to change. Some suggest that one way to promote change is for governments to provide funds to the "winning" industries, rather than propping up the "losing" industries. It is another one of those great slogans. But is not the decision of the British and French to produce the Concorde a vivid example of how misguided such a policy can be? And the condition of most of the planned economies of the world are all the illustration we need that government officials usually lack the facts on which to act, and that even if they have the facts, they can't act on them quickly or sensibly enough. That is even more true in a country such as ours with its democratic restraints that I have cited earlier.

And so my prescription is a reduction, rather than a further expansion, of our reliance on the rules of the trade game which have been adopted recently. Instead of being so proud of our work, I believe we must recognize that the very creation of this elaborate system of rules stands in the way of orderly change. We ought to be thinking about ways that we can channel our resources to accelerate production change. Instead, our focus has been on how we best preserve the status quo and resolve disputes between those seeking access to it.

3. Create suitable private remedies for trade disputes.

Most of the "trade disputes" for which you are considering remedies concern arguments about access to customers. Are foreign suppliers pricing "unfairly" or are they receiving "subsidies" from their governments? Are they shutting off sales opportunities for our own producers in their own or in third countries?

For many of these problems, it is difficult for the private party to secure information, much less adequate relief from the laws as they exist. We need the countervailing duty law and Section 301 of the Trade Act. We probably don't need the antidumping title or Section 406.

At the present time, the thrust of all these laws is to encourage the government to become the champion of every aggrieved domestic producer. It is right for the government to care about its citizens. But why should the government always champion the side of American businessmen who have decided to make a product, rather than the side of American businessmen who have decided to import and sell a product? What about consumers or the producers of dissimilar, but competitive, goods? And why should the government be required -- as it is -- to sacrifice its larger interests in protecting national security or its more general international relations just because certain citizens feel a foreign government's policies favor their competitors. That situation was most poignantly presented to me while I served at Treasury: the continued existence of NATO's major submarine base in Spain was placed in jeopardy by the insistence of certain California olive growers that a countervailing duty of 2% be applied to Spanish olives. In the end we applied the duty -- and the Spaniards didn't close our base. Perhaps it was all bluster by all concerned all along. But it could have worked out badly. Our current disputes with Mexico affect a parade of products whose exclusion may still yield a bitter harvest.

I suggest to you, therefore, that serious consideration be given to getting the government out of many of these cases. Create a meaningful private remedy for the alleged wrongs of foreign entrants into our market. Is price discrimination a trade evil? We have domestic laws that purport to condemn it -- provided, however, that it has an adverse effect on competition (not merely on some of the competitors). Apply the same rule to all products. Whether foreign or domestic, anticompetitive price discrimination should be outlawed. Those injured by the behavior should have a forum in which to pursue their claim and be entitled to a judgment that makes them whole. In our present world, it should not be the serious problem it was in 1916 or 1921 to secure jurisdiction over the foreign suppliers or their domestic distributors. Experience with the "revitalized" Section 337 procedure at the International Trade Commission demonstrates that private remedies can work well, rapidly and with adequate due process.

The Senate has been considering a few bills attempting to rewrite the Antidumping Act of 1916. That is a step in the direction I am advocating. But I would accompany the adoption of a meaningful remedy with a drastic reduction in the opportunities for invoking governmental actions under the 1979 legislation. It should be reserved for only the most major situations in which the government has "reasons of its own" for feeling the need or opportunity to participate.

4. Tinkering with the law as it is.

Let me turn now to just a few comments on some of the proposals that may be offered to you by the Administration to modify in a much more minor -- and, therefore, to my mind, much less useful -- way the Trade Agreements Act of 1979. As I have written elsewhere in more scholarly length, the Act (and its predecessors) appear to be aimed at what I call the "pimples on the trade landscape." Trade worth a few hundred million dollars, at most, is affected by these remedies. When we are faced with the truly large trade problems we shrink from applying what the law seems to have suggested is the "right remedy." In steel, autos, textiles, agricultural products -- the imports and exports we value in billions of dollars -- we apply political remedies. That alone ought to give you pause about the efficacy of what we have created.

But how does the Administration propose to tinker with our existing statute?

a. Abolish interlocutory judicial review. Our federal courts have wisely adopted rules that tend to prevent parties from engaging in what are called "piecemeal" reviews of interlocutory decisions. The notion is that a single appeal from all of the rulings of a trial court will eliminate many reasons for review, conserve judicial and public resources and, ultimately expedite the entire legal process. The theory does not always work. And there are numerous "safety valves" attached to the machine to permit occasional reviews of preliminary orders.

All of that sense, developed over many years by the federal courts, was cast aside in a frenzy to put the administrators of the trade laws into judicial straight jackets. Virtually every type of important interlocutory decision is made separately reviewable by the Court of International Trade. And that court has accepted the invitation it was extended. It has, indeed, encouraged second guessing harassed adminsitrators during the far more leisurely pace of a law suit, sometimes sending the same case back to the ITC or ITA three or four times for new calculations that, in the end, seem to result in revised margins or duties measured in tenths of a percent.

The Administration will urge that such interlocutory reviews be abolished. They should be. Before they are heard, the case may well be at a far later and better developed stage -- since, rightly, the proceedings are not stayed during the court review. Any errors made in preliminary stages should be reviewable -- if they contributed to the final result from which an appeal is taken -- as and when the final decision is reviewed.

b. Simplify the protective order procedure. After three years of experience with the procedure of divulging to outside counsel under protective order confidential information supplied to the ITA and ITC by the parties to trade cases, the process has become relatively routine. However, it cannot work effectively within the abbreviated time periods of the law if the agencies granting such orders must examine on an individual basis each document to be released. The agencies must be allowed and encouraged to adopt regulations that will routinely provide certain classes of information to outside counsel willing to sign standard forms of confidentiality agreements. Peculiarly sensitive information, such as customer names, input costs and the sources of information obtained by the agencies -- categories now generally not released under protective order -- could properly be excluded from the standard form of release. If the ITA proposes some regularized procedure for issuing administrative protective orders, it should be cheered on.

c. Modify the § 751 procedure. Probably no reform made by the Trade Agreements Act was more important than the enactment of § 751. For the first time, the law focused not only on the "front end" of the great tariff machine but recognized it had a large tail end that also deserved attention and time limits if it was to operate. It grew out of Congressional impatience with Customs' apparent inability to assess and collect for as many as seven years the antidumping duties allegedly due on imports of color television sets from Japan. And it mandated an annual review of each outstanding antidumping and countervailing duty order, at which time duties on the past year's entries would be assessed and a rate for collecting estimated duties for the ensuing year would be established.

While the idea was good, the implementation has turned out to be real problem because it was not adequately thought through. Let me mention some of the problems and how the Administration proposes to cope with them:

-- retain the law of the case. In some senses, this is the most important issue. It concerns the extent to which any of the parties involved in one of these cases -- including the government itself -- should be bound to continue applying a particular decision once it has been made. If, for example, ITA decided in the initial fair value investigation that "certain electrical motors" constitute motors having a certain dimension, to what extent can any of the parties argue during the § 751 case that larger or smaller motors, or those with certain added or few characteristics, are within the scope of the earlier order? To what extent are newcomers, who never participated in the fair value phase of a case, bound by principles applied to their co-producers but left unchallenged by them perhaps because as to them -- but not the newcomers -- the rule had no material impact? If you follow current developments in this area of the law you will recognize I am not citing hypothetical cases.

On the one hand, a decision, once made, ought not to be open to constant revision each year. On the other hand, the market is not static. It responds to the fact that an antidumping or countervailing duty order has been put into place. The ITA cannot be blind to changes that are intended to circumvent the letter of its orders.

It seems to me the only sensible way in which this problem can be handled -- at the same time that today's incredible strain on the Customs Service and Commerce Department is relieved -- is to adopt an automatic "sunset" provision. Antidumping and countervailing duties should automatically expire, after, say, three years. Then, if the problem that gave rise to the order is renewed, a possibly more expedited procedure to restore the earlier order might be adopted. But a short time period of effectiveness would render less unfair the rigid application of a law of the case rule to all orders.

-- permit sampling and averaging in the duty assessment phase. Currently, only a significant percentage of home market and U.S. sales are investigated and compared in determining whether dumping has occurred. But every single import is examined after an order is in place for the to-the-penny calculation of the actual antidumping duty. This legacy of a more leisurely past ought to be dropped. The same samples that were considered adequate for finding the existence of dumping in the first place should suffice for establishing a percentage rate of duty applicable to each foreign producer shipping goods subject to the order. That duty rate would then apply to that producer's merchandise until the sunset of the order, subject only to the initiation of an action by the importer to have returned any excess duties collected because the foreign supplier's prices were actually revised by more than, say 50% of the amount of duty being collected, or an action by the domestics to have the duty increased by at least 50% due to renewed dumping. Such a program would, in part, parallel the EC's procedures and, I believe, markedly reduce the complexity and burden of the current procedure.

-- reduce the allowable adjustments to foreign and domestic prices. This is an appealing notion that ought to be firmly rejected. It is only through "adjustments" that account can be taken of the frequent differences between products, methods of marketing and selling techniques in foreign and the U.S. market. The siren song of a "quick and dirty" comparison must be rejected. It seems that the suggestion Treasury made and which found its way into the law to disregard "de minimus" adjustments -- those with an impact of less than 0.5% -- has not been effective. In order to know whether this threshold is met, just as much of an investigation is required as if the adjustment were not to be rejected merely because of its size. And to the extent that many antidumping and countervailing duties are in ranges of under 1% -- as they often are, particularly after the first § 751 review -- a "de minimus" adjustment of 0.5% may be equal to half of the entire duty!

If we persist in retaining these laws, we must apply them fairly. Fair comparisons of merchandise prices require recognition of the myriad adjustments claimed by all sides. It is only by shortening the duration of the outstanding orders that we can save our manpower from overwhelming workloads. That goal ought not to be reached by discouraging accurate product comparisons.

d. Eliminate the application of the antidumping and countervailing duty laws to imports from non-market economies. The problems of applying Title I of the TAA to imports from "traditional" suppliers in the EC or Japan are often regarded as minor compared to the difficulty ITA perceives in applying the law to imports from the so-called non-market economies. Having wrestled with this problem myself and being responsible in large part for the adoption of what is wryly called the "Golf Cart Rule" on the application of the antidumping law to imports from non-market economies, I am here to defend the approach now taken by the law. Contrary to the jokes made about the subject and the protestations of "impossibility" heard from my successors, I believe the rule we adopted makes sense (within the terms of the antidumping law as a given -- perhaps not otherwise). It is a rule which a study by the GAO has endorsed as the best of the proposed alternatives. It ought not to be scrapped lightly.

Because this is a story with which I am so personally familiar, I hope the Committee will forgive me if I discuss it in some detail:

Golf carts produced by a Polish aircraft manufacturer for the U.S. market provided the quintessential "problem" case of imports from an "NME" under our antidumping law. The product was made and shipped by an enterprise whose sole commercial market was the United States. As has been aptly stated elsewhere, "the Poles put the cart before the course": there being no golf courses in Poland, there were also no sales of the product in the home market. And, indeed, there were no real sales elsewhere, as sportsmen in other lands apparently regard their hikes through the links an important part of the game!

But although much [illegible] has been poked at this Polish story, the *Golf Cart* [illegible] demonstrated convincingly that the antidumping law [illegible] Treasury Department's handling of the problem before 1977 [illegible] at the very least, not well considered. At that time, efforts were made to obtain the "fair value" of the golf [illegible] from the prices at which an obscure Canadian producer [illegible] small quantity of carts. The results were unsatisfactory [illegible] every participant in the case, (although echoes [illegible] that absurd procedure are now heard in cases involving certain textile products from the PRC). And when that Canadian producer went out of the business of making what Treasury had considered was as at least roughly comparable foreign-made merchandise, it was necessary to consider a new approach. Treasury said any new rule had to be

- -- fair, and not discriminate against the so-called "state-controlled economies" because of their political systems;

-- consistent with existing principles of the antidumping law; and

-- perhaps, most crucial, "administrable" by government officials (and, of course, the parties concerned).

Treasury ultimately adopted the rule that the GAO has confirmed meets these tests. In essence, it allows a producer in a state-controlled economy to utilize its own factors of production and to value them in a "free market" of comparable economic development to develop a "constructed value," as that term is generally understood under the antidumping law. However, unfortunately, the rule the Commerce Department applies allows this constructed value approach to be used only if more "traditional" techniques in calculating fair value, albeit through surrogates in market economies of comparable development, are inadequate or unsuitable.

The result has been that in almost all of the cases decided since 1979 in the initial stages (i.e., not under section 751 of the new law), the prices and costs of third companies, in countries other than those in which the goods were produced, were used to establish the "fair value" of the merchandise under investigation. In Steel from Poland, a Spanish producer's prices in the home market were used; in Menthol from the PRC, Paraguayan export prices to the U.S. served as surrogates; in Truck Axles from Hungary, an Italian company's home market sales are the reference. In the most recent decison, a further abbreviation crept in: In Griege Polyester from the PRC, the fair value was determined by averaging import prices from all third country suppliers.

In my judgment, this is not sensible policy. It flies in the face of legislation enacted as a part of the Trade Act of 1974 with respect to antidumping investigations concerning merchandise from other than the so-called state-controlled economies. Then, Congress specifically rejected as appropriate the utilization of third party prices and costs for establishing the "fair value" of a particular respondent's merchandise. It recognized the inability of such a respondent to exercise any control over the prices and costs of the third party being used. Congress did not want to deny to the very respondent in a case the ability to assure itself that it is not dumping (unless it retreats from the market entirely -- which it surely is not the aim of the law to achieve). And yet that is the result of the "third party price or cost" rule.

Not only is the application of third party pricing or costs to a respondent unfair to the exporter from the state-controlled economy (and thus violative of what I think is the first principle that ought to apply), it is also in many cases absurdly difficult to implement by the government. The GAO Report amply documents this fact. I can also attest to it from personal experience: When I was at Treasury we sought the prices of the U.S. manufacturers of golf carts -- presumably the parties with the greatest interest in furnishing that data and most familiar with the reasons why it was needed and how it would be safeguarded and used. But even they were reluctant to give the government those facts. How much harder and more frustrating it is to search around the world for surrogate producers in other countries to supply facts about their sales and costs for a proceeding in which they have no direct involvement or even interest. The use of third party prices and costs is, therefore, not administrable. It ought to be scrapped.

If it were scrapped in favor of the simulated constructed value approach that Treasury proposed and that the GAO Report endorses, is that a rule that meets the principles I mentioned earlier? I suggest it does. It fairly allows a particular producer to attempt to demonstrate that its prices are not below its costs, and thereby gives that party some ability to control its market behavior. It also allows the producer from the state-controlled economy to try and show that it has a comparative advantage in making and selling the goods or services in question. Verification of input factors is no more difficult than the verification of other information routinely reviewed by Commerce or Customs officials in anti-dumping and other cases. And "pricing" these factors in a surrogate economy is not necessarily a difficult task -- particularly if the burden is placed on the respondent to demonstrate a technique and selection process as the Polish producer of golf carts was well able to do.

If it is a sensible rule, why is it not being adopted? Criticism has focused, first, on the notion that a market economy of "comparable economic development" can be found in which the pricing aspect of the exercise is "reliable." I suggest this criticism misses the point. It is not necessary that the Administering Authority be satisfied that every criterion of "market development" be identical or even similar for the purpose in question. A rough comparability, to which most responsible economists would agree, is sufficient and, indeed, exists. The countries of Eastern Europe are, in many ways, at a stage of economic development not dissimilar to some of the market economies of the Mediterranean basin: Greece, Spain, Portugal. Comparisons of the costs of labor and energy and capital in those lands provides an adequate guide to "free world" costs of those same factors in Poland or Hungary. Moreover, to the extent that, as the GAO Report indicates, some of the inputs a particular state-controlled enterprise buys are obtained on world markets in convertible currency, there is no reason not to price those inputs at their actual prices. And as the economies of some of these countries move toward a "reform model," with less rigid central planning and even more freely convertible currencies, it may even be possible to use all of the internal prices and costs of those producers.

That is not to say that there are no difficult cases in which the rule might be hard to apply. With respect to the PRC, for example, I was one of those somewhat astonished to find the Commerce Department selecting as the surrogate for the most populous state-controlled economy in the world, what might aptly be termed a family-controlled principality in Latin America. Finding suitable economies with which to compare the Soviet Union or China is hard. But it is not impossible, and certainly ought not for that reason to be rejected with respect to the many more numerous situations in which we are dealing with merchandise from countries for whom surrogates can be found with relative ease.

Criticism of the rule has also focused on the alleged difficulty petitioners would have in stating an adequate case of dumping if they were compelled to develop the imagined costs of an Eastern European producer and then to "price" those costs in some undetermined third country. In fact, I suggest that the petitioner has, in some respects, an easier time in attempting to establish sales at less than fair value in such cases than in situations in which he must seek price data on foreign home market transactions. A projection of his own costs and factor inputs, suitably adjusted for the foreign locale from published information, is precisely what the existing Commerce Department regulation (19 CFR § 353.36(a)(7)) contemplates for such cases. It ought not to be more difficult to apply in the case of Polish wares than in the case of Swiss or French merchandise.

A third criticism of the rule stems from fears that the records of producers in state-controlled economies will either be unavailable for inspection by U.S. Government verifiers or will be unreliable even if examined. To the extent a producer (or its government) declines to permit access, the law and regulations have an ample answer: the "best evidence rule." The situation is no different than any other in which cooperation from respondents is not forthcoming. With respect to reliability, one must await actual experience. However, it can be said that in the two cases in which the input records of the state-controlled economy producers were meticulously reviewed by Treasury and Commerce personnel -- Golf Carts from Poland and Montan Wax from the German Democratic Republic -- the records were found to be more than adequate.

A fourth objection suggests that since the state-controlled economy may attempt to foster one type of production rather than another, it may "unfairly" be able to demonstrate real comparative advantage in the favored industry. But why is this unfair? Our entire trading system is supposed to be based on comparative advantage. We should encourage it. It is sensible for the Hondurans to grow bananas, just as it is unreasonable for Icelanders to try to do so. Similarly, if Poland has coal resources, it should mine and export coal. If Hungary has a technological base in electric light bulb manufacture, it should exploit that advantage. Only to the extent that the Hungarian producers are, in effect, growing bananas on the ice cap in a hot house subsidized by the government should we complain. But then there is ample scope in the administration of our existing law (even without the use of the countervailing duties law) to find margins of dumping, since obviously, their labor or material costs will be excessive. If, however they do have a comparative advantage, why should American consumers be denied the ability to buy their goods? If there is any "unfairness" it is to our own people.

This latter criticism of the constructed value rule assumes that export industries in state-controlled economies are often "targeted" for stimulus and support. Senator Heinz has suggested this is a fact. Of course, to some extent all economies -- including our own -- that buy at least some goods abroad, must export in order to earn the funds with which to buy what they need. And all of us are encouraging exports to some degree. But it is very hard to prove (rather than conjecture) that the economies of scarcity that characterize most of the countries we call "state-controlled economies," are particularly or effectively pushing their export industries in other than those fields in which they do have some comparative advantages. The Polish producers of hams, for example, whom I happen to represent, have been shipping their products to this country in volume since before World War II. It was as sensible an economic judgment that this was a good market for their products in 1930 as it is in 1980. Golf carts were made specifically for this market -- just as there is specific merchandise made here for unique foreign markets. But those carts were (and are) made in a factory that, apparently, can stamp, paint and assemble the sheet metal involved with relatively low inputs of material, labor and energy. That is not "unfair" or "artificial" pricing.

Finally, the rule is criticized as too hard to administer. There may be situations in which the search for input factors becomes too difficult or in which the foreign producer or its government declines to provide the timely access needed by our administrators. But, if so, the other prong of the GAO recommendation also makes sense. That rule suggests finding for "fair value" the average price of the lowest cost free market supplier to the U.S. market, whether foreign or domestic. Clearly, if ascertainable, that price would be a convenient bench mark for exporters in, say, Poland, to follow. That is the standard this bill also proposes -- but exclusively. We support its adoption, as long as the exporter has the option to try and prove a lower "simulated constructed value." Unfortunately, I do not have much confidence that it will be easy to find the lowest average price, and that is why I find the proposed legislation troubling in its exclusive reliance on this principle.

To the extent that merchandise is truly fungible -- the way bulk chemicals or other commodities may be -- the rule may well be workable. But even with respect to such goods, there are differences in grade, packing, terms of delivery, length of contract and the like that may make direct price comparisons with imported merchandise difficult -- at least without making a number of what inevitably become arbitrary adjustments. But as one deals with more fabricated and differentiated merchandise, the notion that one can find the "lowest average price" in the U.S. market becomes virtually impossible. One might find ranges of prices describing classes of roughly similar goods. But even with respect to a canned ham, there are differences in quality -- of water content, of fat, of the "taste" based on the solution in which it was cured or the food eaten by the swine from which it was made -- that affect price. And with manufactured items there are often non-functional differences in appearance and style, in warranty and after-sale service terms, in delivery times and spare part availability, just to name a few, that makes the contemplated "to-the-penny" comparisons untenable.

There is also a small question of fairness. The rule allowing exporters from state-controlled economies to use the lowest U.S. price may be seen as giving those producers an unfair advantage that sellers in free market economies lack. But I do not find the rule objectionable on that basis. It rests on notions this Committee has, in connection with the antidumping amendments in the Trade Act of 1974, recognized as proper. It is based on the view that foreign merchandise priced above goods available in this market that are not being dumped or subsidized cannot, as a rule, be seen as a cause of injury to the U.S. industry. Nevertheless, it might be appropriate for this Committee to consider amending the statute generally so as expressly to permit exporters from all countries to demonstrate that they are not dumping within the meaning of the law by submitting proof that reasonable quantities of such or similar merchandise are available on the U.S. market at even lower prices.

Conclusion

My detailed discussions of some of the amendments to the TAA that may be proposed to you by the Administration are not intended to derogate from the comments made at the outset. Those are the views that I most sincerely urge upon the Committee. Do not rush to judgment. Do not once more succumb to the pressure and itch to "do something." As Congressman Frenzel is reported to have said "If you believe in free trade . . . it will be a good session if nothing passes in the 98th Congress." Instead, commission the serious study that has for so long been sorely needed but never undertaken. Focus the Nation's attention on the ways in which we can make more and sell more of what we make rather than on how we can even further limit the opportunities of others to sell their wares to us. That is the oversight the program needs and that only you can provide.

Thank you.

Chairman GIBBONS. I have always wondered, if we have an unfair trade practice like a subsidy and U.S. industry is injured, why the Government takes the money and the injured industry just kind of sits there and has to perhaps eat it, write it off.

Do you think we could devise a manner in which these benefits would go to the private industry or would that produce a tremendous amount of immediate litigation?

Mr. EHRENHAFT. I think that it would create——

Chairman GIBBONS. Suppose I am making scissors and scissors coming in from South Africa are subsidized to the extent of 50 percent. I am injured. I have to take a chapter 11 reorganization.

I am really injured because of these subsidized scissors. Should I be able to bring an action against the subsidized scissors importers or should I be able to bring action against the U.S. Treasury?

I can't really sue the Government of South Africa that would be subsidizing the scissors. Have you given any serious thought to what they would do?

Mr. EHRENHAFT. I have.

Chairman GIBBONS. Would it be a violation of GATT? I don't know.

Mr. EHRENHAFT. The notion of the countervailing and antidumping duties is not that the actual duties would be collected. They are intended to be——

Chairman GIBBONS. To discourage somebody from engaging in the practice.

Mr. EHRENHAFT. That is right. In fact, one of the reasons why very few duties are collected is because after the order goes into effect, the prices are revised in order to overcome the duty.

Therefore, I don't think the Treasury, in fact, collects a significant amount of money from the duties. That was one of the reasons why we couldn't get the Customs Service to pay a lot of attention, before adoption of section 751 to look at what happened after a countervailing, or antidumping duty order was applied.

If we look at the results of 751 cases, one observes that where there is a continued trade in the product that is subject, for example, to a dumping or countervailing duty order. But the margins are very, very small and the high margins apply only with respect to producers who have dropped out of the market. They bear out the prediction that people had that it is likely that these orders do not result in significant income to the Treasury. That is being demonstrated by the facts. But I think the notion of putting into a pool the customs duties that one might collect under a countervailing duty order and making them available to the injured industry, deserves some further consideration. In part, perhaps it could be part of a fund for the adjustment of these industries. If the funds were available to industries that had adjustment plans, special funds of the Treasury, perhaps replenished through such customs duties, could be appropriately tapped for that purpose.

Chairman GIBBONS. Mr. Frenzel?

Mr. FRENZEL. I want to thank the witness for his excellent testimony. I think he gave us some interesting information and suggestions.

I notice that you are talking about in one of your pieces of testimony—you talk about limiting certain judicial reviews of decisions of the ITC and ITA. You didn't mention that in your remarks here.

I wonder if you could sketch that briefly?

Mr. EHRENHAFT. Under the Trade Agreements Act of 1979, almost every decision taken by the ITC and the ITA is immediately appealable to the Court of International Trade. And many participants in these proceedings have availed themselves of the opportunity to seek such judicial review.

A recent article in American Metal Market indicates that that court may shortly be overwhelmed with a burgeoning case load because so many cases are being appealed from interlocutory orders such as a preliminary determination of no injury or a preliminary determination of no margins.

The fact is that these preliminary determinations do not end the case. The case continues on to final, and the proceedings are not stayed while the court has to consider these preliminary matters.

I think that most students of the act and those familiar with our normal judicial system would say that there is no need for this kind of interlocutory review.

We can await the final determination and have everything reviewed at that one time. That is the way that our normal judicial procedures work in court, and these matters really deserve no different kind of practice.

Mr. FRENZEL. But the losers usually exercise every possible option. If you lose on antidumping, you try 201 and 301 or 337—I suppose you may as well appeal at every stage of the process.

Mr. EHRENHAFT. That is a slightly different matter. What I am talking about is that at the preliminary stage if the margins were found to be non-existent, for example, that the petitioner could seek review then.

The ITA is still committed to having its own hearing and coming up with a final determination which might be different. Under normal appeal procedures, you have to wait for the final judgment before you can appeal. Similarly, it seems to me, there is no reason why we couldn't require a final decision by the ITC and ITA before an appeal to the courts were possible.

Mr. FRENZEL. If you don't accept my decision of shooting the lawyers, I suppose this is the next best thing. Anyway, thank you very much for your testimony.

Chairman GIBBONS. What about the reorganization? What do you think about that operation?

Mr. EHRENHAFT. Well, Mr. Chairman, I thought——

Chairman GIBBONS. I am talking about the proposed reorganization, what do you think about that? I know about the past one.

Mr. EHRENHAFT. I think that the proposed reorganization would be a mistake. I think that the USTR is a very valuable adjunct of the President and something like a USTR would be required even if there were a reorganized Commerce Department.

The President simply needs to have somebody other than a Cabinet Secretary—a special representative—who can negotiate directly and who can do the things that the USTR does.

Similarly, reorganization would not avoid the special constituent trade interests in Agriculture, Defense, State, and so on. All of those problems of the interagency process would remain, and therefore I don't see that this has any purpose other than one of cutting down the size and scope of USTR.

It may be that it would not be a bad idea to cut back on the USTR. It may be that that should be a smaller organization and that it should have less operative type of responsibilities such as in the GSP area and the section 301 area and so on. Some of the adjudicatory type of matters that the USTR now does might perhaps be lodged in one of the regulatory agencies, because that is in my mind not really necessary for a trade representative.

But somebody like a trade representative is going to be necessary in any event.

Chairman GIBBONS. That is the first time I have heard that suggestion, that you pull the GSP functions out. I realize it does take a lot of time and a lot of personnel to administer those laws.

Most of them are administered in the USTR, aren't they?

Mr. EHRENHAFT. They are.

Chairman GIBBONS. Those hearings are extremely involved and require a lot of someone's time. The orders they publish are very involved.

If the USTR just read all those orders, he would have his hands full. Maybe we can shuffle those chairs around a little without hurting anything.

Thank you very much.

Mr. FRENZEL. May I ask a question? Were you in Treasury when the trigger price was invented?

Mr. EHRENHAFT. I was, sir. Guilty.

Mr. FRENZEL. What was the reason it failed—that the economy got too lousy or the steel business got too lousy?

Mr. EHRENHAFT. That was intended to be a temporary kind of device. I think that it would have succeeded and did succeed in the early days as long as everyone thought that the emperor was well clothed.

When over the course of years it became apparent that what was being promised was more than the capacity of the U.S. Government to enforce, and people became sophisticated about ways of evading the trigger price through offshore sales companies and so on, the mechanism broke down.

I think as a temporary measure of monitoring imports and of preventing the total exclusion of European imports which might have resulted from the antidumping cases that were then pending, the trigger price mechanism was a useful and important step at the time.

Mr. **Frenzel**. Tell me why it wouldn't have been better policy for the antidumping cases to go forward?

Mr. **Ehrenhaft**. The feeling was at the time that the currency differentials between the European currencies and the dollar would have created very large dumping margins for most of the European products. The effect of that would have been that most European carbon steel would probably have been excluded from the United States, to the benefit of the Japanese, more than to the benefit of the U.S. industry, because there were no dumping charges pending against the Japanese at the time. The feeling was that the Japanese had capacity to fill the need, and probably they would then step in where the Europeans might have been excluded, and/or Koreans or other third country suppliers would have benefited. But it was because—the feeling was that the European currencies at that time were overvalued and that the dollar was undervalued, the opposite of the situation today, and that some temporary measures, until the currencies could be restored and this apparent dumping would then be avoided, was all that was needed. So temporary measures were proposed until we would reach equilibrium.

Mr. **Frenzel**. Go a couple of years further. Should we have allowed the dumping cases to proceed the second time around?

Mr. **Ehrenhaft**. If the dumping cases had proceeded the second time around, I feel fairly confident that but for a few producers there probably would have been very modest, if any margins. The countervailing duty cases were the ones where significant margins may have been found and where significant duties might have been imposed.

Dumping I am not sure would have resulted in any significant margins, again, because of this currency problem. Indeed, this currency problem makes a mockery of our antidumping and countervailing duty measures. The currencies change in a day. We have no way of controlling or doing anything about that. That is an area where I believe very serious attention is required in the next year.

Mr. **Frenzel**. Thank you very much.

Chairman **Gibbons**. Thank you. Both your summary and your entire statement will be included in the record.

Mr. **Ehrenhaft**. Thank you.

Chairman **Gibbons**. We now have Mr. Rivers and Mr. Potter, representing the Ad Hoc Committee of Domestic Nitrogen Producers. Gentlemen, glad to have you. Sorry you had to wait so long. We know it has been not only long today, but the other days.

STATEMENT OF RICHARD R. RIVERS, COUNSEL, DOMESTIC NITROGEN PRODUCERS AD HOC COMMITTEE, ACCOMPANIED BY PHILIP H. POTTER, CONSULTANT

Mr. **Rivers**. Mr. Chairman, we have a full statement.

Chairman GIBBONS. We are going to put that in the record.

Mr. RIVERS. In addition, we have prepared an executive summary which probably also ought to go in the record.

Chairman GIBBONS. Both will go into the record.

Mr. RIVERS. I will summarize the executive summary to be brief. Mr. Potter and I have a common client with a problem. The client is the Domestic Nitrogen Producers Ad Hoc Committee, a group of some dozen or so domestic producers of nitrogen fertilizers, most commonly what is known as anhydrous ammonia, the most common form of fixed nitrogen fertilizer used in agriculture around the world.

Our clients face a serious and growing problem. At the present time, it appears that, at least from our perspective, that this is a problem for the nitrogen fertilizer industry, but the more we get into this it appears we are not just talking about anhydrous ammonia. We are not just talking about petrochemicals. We are talking about a problem that potentially affects any industry in the United States, particulary resource-based industry, and it is a problem that presently falls through the cracks in U.S. trade laws. It is the problem posed by nonmarket economy trade and State controlled enterprise.

I, as you know, have been a student of U.S. trade laws for some 15 years, and in my opinion, there are really no good, effective tools for dealing with this problem. What is interesting is that we had occasion to sit in on some of these hearings and you have had a number of witnesses make reference to this problem, and, in fact, Mr. Cunningham, who has in the past represented clients who are foreign suppliers of anhydrous ammonia to the United States, actually agreed in his testimony—I think if you look back at the record, he agreed that this is a serious problem.

This problem poses a serious gap in U.S. trade law and it is one that needs fixing. I would now like to talk about how the problem arises in the ammonia context.

Anhydrous ammonia, as I said, is a basic form of fixed nitrogen used in agriculture. It is made basically from two things, air and natural gas. There are some other catalysts and whatnot that are used in the chemical process, but by and large those are the basic raw materials of anhydrous ammonia.

For a typical producer of anhydrous ammonia, most anywhere in the world, two-thirds of the cost of producing it is the cost of natural gas. But in recent years, there has been a disturbing trend in particularly the nitrogen fertilizer industry.

We are finding, like many American industries, that we are faced with increased foreign competition, but in our case the competition that we are up against is a very troubling kind and it raises, I think, some very profound issues for U.S. trade officials for the Congress.

The competition that the nitrogen industry faces abroad tends to be from nonmarket economies or from state-owned enterprises. They are Government monopolies. Typically, their governments are making natural gas feedstocks available to them for the production of ammonia, virtually without cost, to turn into nitrogen fertilizers to be sold in the U.S. market at whatever price can be obtained.

Here is a step-by-step description of the process. First, a government, a foreign government, undertakes to exploit its reserves of natural gas by creating a modern state-owned petrochemical industry which is targeted at export markets.

Second, that government undertakes to provide the natural resources that it holds in public trust to a state-owned ammonia producer on virtually a cost-free basis or at an artificial price, which is intentionally set below its real market value to foster petrochemical production.

Third, because these plants are owned by governments which are hard pressed for foreign exchange earnings, they are built to supply export markets and are operated to supply a fixed quantities to those markets each year virtually without regard for demand for the product.

Fourth, the government in question, having little or no current notion of its cost of production, offers the ammonia at whatever price can be otained and typically below any price at which any private or rational producer can hope to compete.

We have all sat and listened to people talk about government and state enterprises and monopolies, but this is the most dramatic example in my experience of how when governments undertake to become players in the marketplace, they play by different rules.

Let me give you an example. What these governments are telling their producers is basically as follows. It is telling the producer, sell 1 million tons of ammonia this year in the United States at whatever price you can get for it.

The U.S. producer, in contrast, typically has a pretty good current notion of what his costs are. For example, he knows that it costs him say $160 per ton to produce ammonia and, say another $20 per ton to return the investment in his plant, and he says to his manager, sell all the ammonia you can at $180 per ton, or better, if you can get it, but don't sell any for less than $180. We will turn it off because we don't want to compound our losses by selling at below the price.

The current problem arises because the government's monopoly is concerned with selling a fixed quantity without regard to demand in the market and the U.S. producer is primarily concerned with making a profit and avoiding a loss and he will regulate the volume of his production accordingly.

I hope the implications of this are clear to you and to the subcommittee. What we are talking about is not a problem for the domestic fertilizer industry. It is a problem that confronts any producer in any industry in the United States.

We have a trend underway here of not only nonmarket economy product, products originating in nonmarket economy countries coming into the United States, but also products coming into the U.S. marketplace that are manufactured by state-owned enterprises in mixed economy countries, including some very close neighbors.

This is a problem that is absolutely not addressed adequately under U.S. trade law. This industry that Mr. Potter and I jointly represent has a long track record of efforts to deal with their particular problems within the existing frame work of laws.

Several of these companies were the original complainants in the Soviet ammonia case under section 406.

I think you may recall what a fiasco that was. In addition, other companies have filed section 337 cases alleging that this type of conduct is challenged under that provision of U.S. law and the ITC has taken the position that this is an antidumping matter and have referred it to the Commerce Department, which has taken the position that it is not an antidumping problem.

There is pending a countervailing duty case on imports from Mexico before the Department of Commerce. I am counsel for four companies that brought that case.

We have obtained an affirmative preliminary determination. The Department agrees with us that the state monopoly producer of ammonia in Mexico, which is Pemex, is receiving a valuable input, natural gas, from a state monopoly holder of natural gas, which is also Pemex, at a preferential basis.

The preliminary determination has yielded a rather small margin. We have a serious quarrel with the way the Department has calculated it, but I am not here to try that case.

Chairman GIBBONS. Do you have a right of appeal?

Mr. RIVERS. There is an opportunity for interlocutory appeal, and that option was available to us, but the standard which the Congress, I think quite properly, placed at that point is that you have to show that the decision by the administrator was arbitrary and capricious.

At the time of the final determination, you can appeal and you merely must show that their decision was not supported by substantial evidence on the record.

So we privately believe that it was arbitrary and capricious, but we are going to continue our quest for a remedy at the departmental level.

Chairman GIBBONS. Let me ask you a question here. If on final appeal the court says it was arbitrary and capricious, how far back does the collection of those duties go?

Mr. RIVERS. To the time of the preliminary, the date of the preliminary, when suspension of liquidation occurred and they began collecting the duties.

If we are able to get the margin increased, it will only be up until the time of the final. We won't be able to go all the way back to the preliminary for the full margin.

The point I want to make is that even if we are successful in this rather unusual countervailing duty petition, it will not really have addressed all the ramifications of the problem which this industry faces.

The current U.S. remedies under U.S. trade law, the remedy which Congress designed in 1974 was section 406, as you know. I think almost by common agreement, section 406 of the Trade Act of 1974 does not work.

I think all parties, at least in my experience, agree that that is not—that that is a dead letter in U.S. trade law. But the problem that section 406 was designed to address continues, and in fact, is growing, at least from our perspective, and is becoming much more severe.

I suspect that may be the case in other industries. We are talking about ammonia here, but there is steel coming into the United States from nonmarket economy countries. There has been an effort to try and deal with this in the antidumping context and the regulations, the so-called surrogate country method of analysis where an investigator from the Department of Commerce in a typical case tries to determine a country which is in a comparable stage of development, say, a communist country, and in effect, travels to Spain and pretends he is in Poland and tries to calculate what kind of a cost there is to making a golf cart.

That hasn't worked either. Mr. Potter and I are giving a great deal of thought to this, as are others around town. There is no question in my opinion—I tried to speak here as a practitioner and not just as an advocate for a particular industry and client—no question but what this is a real gap in the law, in my mind, and one that you really ought to act to come up with some reasonable way of dealing with it.

I don't think anyone is saying that subsidies, for example, in the context of the subsidies code, the question was often asked, just because something is state owned, does that mean that that is, per se, a subsidy?

The answer we always gave was, no, state ownership, per se, is not a subsidy, but when state-owned enterprise is operated in a manner which is inconsistent with commercial considerations, then that is another matter.

What we are finding is that these enterprises are actually playing as market players in the U.S. market place, but they are motivated by something other than the traditional motives of private producers.

They are motivated by a desire to earn foreign exchange or whatever else. Mr. Potter has considerable experience in this.

I would like to ask him if he has comments that he wishes to put on the record.

Mr. **Potter**. I would like to emphazise a couple of points, Mr. Chairman. In terms of the cost question, and I think Mr. Cunningham raised this in his testimony last week, that the costs and prices are artificial, certainly in nonmarket economies, and we find very similar actions in the case of Government-monopoly producers such as the Pemex situation in Mexico in the current case.

These producers essentially ignore their costs when they get to the marketplace, where costs are a restraining factor for a U.S. producer. You don't want to sell below your costs and take losses.

These producers tend to run their operations and measure their success in terms of volumes of production, and so we end up with an erratic entry of supply into the marketplace, sometimes oversupply and sometimes not.

It affects the price, suppresses prices and has sort of a stairstep effect that tends to feed on itself. You can look at this as a dumping problem or—the flip side of the coin—you can look at it as a subsidy problem.

The underlying problem is that the prices set by the Government for raw materials, in this case natural gas, are artificially set.

We have no way of determining whether that price—assuming it can be determined, as in the case of Mexico—is a reasonable price in the marketplace in Mexico or in a world market if a world market exists for gas or some other material. There must be some standard of comparison to show that the price is or is not a subsidized price. But there should be some commercial benchmark against which it is tested.

That does not appear to be the case under current interpretation of law. In the case of a nonmarket economy, there is some question of whether you could determine what that real price is in any event because of, again, the artificiality in exchange rates, for instance.

The underlying problem is, then, some market test; can you find some market test. We tried to do that through the constructed-value process.

Mr. Rivers mentioned the surrogate problem. I think the committee is well aware of the deficiencies and complaints in that regard. Mr. Cunningham suggested an alternative modification to the dumping laws that would establish a standard of lowest-market price against which you would compare the import price and if they were at or above that, it would not be dumping in the case of a nonmarket economy.

That presents some rather unique problems and results, given the kind of marketing process that these Government monopolies undertake. I repeat, that performance is based on volume.

If you set the price, a nonmarket economy will import preset volumes of products, whether they are more efficient producers or not. That is the underlying premise of the Heinz bill, that that lowest market price would represent the most efficient producer in the marketplace. Yet, that price may be from another subsidized-state producer or be a suppressed price.

Mr. **Rivers**. Senator Heinz has introduced a bill on the Senate side which would adopt the proposal that Mr. Potter describes.

As we see it, the defect in that approach is that it basically assumes that a nonmarket economy producer is as efficient as the most efficient foreign supplier to the U.S. market, and we think that gives away too much because we don't think they are that efficient ever.

Mr. **Potter**. Our clients have a tendency to object to the result. To the extent that oversupplies the market, they are going to be forced to shut down their plant.

U.S. producers are forced to respond to the marketplace's price. They are not going to sell below their costs, and yet they are not being shut down by a more efficient producer. The only difference was in the cost of the gas.

[The prepared statement follows:]

STATEMENT OF RICHARD R. RIVERS AND PHILIP H. POTTER, ON BEHALF OF THE DOMESTIC NITROGEN PRODUCERS AD HOC COMMITTEE

Mr. Chairman and Members of the Committee: I am Richard R. Rivers of Akin, Gump, Strauss, Hauer & Feld. With me is Philip H. Potter of Charls E. Walker Associates. We are representing the Domestic Nitrogen Producers Ad Hoc Committee. We welcome this opportunity to appear before the Subcommittee on Trade to discuss a serious and growing problem confronting the domestic nitrogen fertilizer industry. This problem concerns a unique unfair trade practice, which, in our opinion, is inadequately addressed by existing law. At the present time it appears that this practice is primarily a problem for the nitrogen fertilizer industry. However, we are convinced the same problem poses a serious threat to the existence of the entire domestic petrochemical industry, as well as other industries, unless an effective solution is found and found soon. The Ad Hoc Committee has prepared a written statement covering the subject in considerable detail. We request that it be made part of the record. At this time, however, we wish to outline it for you in the simplest and most straight-forward manner possible.

In order to appreciate fully the nature of this problem, one must first know something about the anhydrous ammonia industry. Our joint clients are eleven domestic producers of anhydrous ammonia, a basic petrochemical product which is the most common form of fixed nitrogen fertilizer used in agriculture and essential for food production around the world. Anhydrous ammonia is made from only two feedstocks: (1) natural gas (or occasionally a substitute hydrocarbon); and (2) air. Most of the ammonia produced in the United States is used as nitrogen fertilizer either directly as ammonia or other forms of nitrogen fertilizer made from ammonia. The United States is the largest market in the free world for fertilizer. For most U.S. producers of anhydrous ammonia, the cost of natural gas constitutes about two-thirds of the cost of producing the product.

In recent years, a disturbing development has emerged in the nitrogen fertilizer industry. Increasingly, foreign producers located in countries with large reserves of natural gas are entering the world nitrogen fertilizer market. These producers, however, are presenting a new and very troubling form of competition for private producers. They are state-owned enterprises - government monopolies - and their governments are making natural gas feedstocks available virtually without cost to turn into nitrogen fertilizer to be sold in the U.S. market at whatever price can be obtained. Here is a step-by-step description of the process and its result:

- First, a foreign government undertakes to exploit its reserves of natural gas by creating a modern, state-owned petrochemical industry, targeted at export markets.

- Second, the government provides the natural gas to the state-owned ammonia producer on virtually a cost-free basis or at an artificial price which is intentionally set below its real market value.
- Third, because these plants are owned by governments which are hard-pressed for foreign exchange, they are built to supply export markets and they are operated to supply a fixed quantity to those markets each year.
- Fourth, the government in question having little or no current notion of its costs of production offers its ammonia at whatever price can be obtained and typically below any price at which a private producer can hope to compete.

In other words, these governments are saying to their producers, "Sell 1,000,000 tons of ammonia this year (or whatever amount was designated that year in their economic plan) in the United States at whatever price you can get." The U.S. producer, on the other hand, knowing it costs him, for example, $160 per ton to produce ammonia and it takes another $20 per ton to return the investment in plant (assuming a reasonable rate of production) says, "Sell the most ammonia you can at $180 per ton or better if you can get it, but don't sell for less than $180."

The government monopoly is concerned with selling a fixed quantity without regard to demand in the market. The U.S. producer is primarily concerned with making a profit and avoiding a loss, and will regulate the volume of its sales accordingly.

In two instances within the last five years -- in the case of the Soviet Union and in the case of Mexico -- governments have undertaken just such plans aimed at converting natural gas into nitrogen fertilizer for sale in export markets, particularly that of the United States. In both instances it has become apparent that these governments are using state-owned reserves of natural gas in desperate efforts to capture U.S. markets and to earn foreign exchange to service external debt.

By now the implications of this phenomenon should be obvious to you. What we are talking about is not merely a problem of the domestic fertilizer industry. This is potentially a problem for the entire petrochemical industry or, for that matter, any resource industry faced with a state-owned competitor whose foreign government provides him his basic raw material on a virtual cost-free basis. It is a problem for U.S. trade policy and for the trading system itself. Moreover, the advantage such a producer enjoys is not a comparative advantage; it is an unfair advantage afforded him by his government which enables him to price his product at a price well below the price at which a private producer, quite rationally, chooses not to offer his product for sale.

Who is the loser in this process? Initially it is the private producer who loses as he sees his customers lured away. Over the medium term, it will be the economy of the foreign country that will ultimately find the cost reflected in the devaluation of its currency. Over the long term, we submit, the list of losers will include the United States which will lose reliable and efficient domestic industries such as the nitrogen fertilizer industry.

There are no remedies under current law which adequately address this problem in all its aspects:

- Section 406 applies only to nonmarket economy trade -- not to state-owned enterprises in mixed economies -- and all sides agree that it has proven unworkable;

- The U.S. International Trade Commission has taken the position that Section 337 does not apply to this problem and has suggested that the issue be taken up under the antidumping statute. That ruling is being challenged in the courts.

  The Department of Commerce which administers the antidumping law has taken the position that the statute does not apply.

- A countervailing duty investigation on imports of ammonia from Mexico is pending at the Commerce Department, but the Department in an affirmative preliminary determination has calculated the net subsidy in a manner which fails to assess in a reasonable way the value of the natural gas.

  The Department has preliminarily determined that Pemex's production of anhydrous ammonia is subsidized, but only to the extent that its gas costs are less than the price at which Pemex sells gas to other industrial users. The problem is that the Mexican Government sets that industrial rate intentionally below market values for the purpose of subsidizing industrial development and production and specifically as an incentive to exports.

At the present time four domestic ammonia producers are aggressively pursuing a remedy under the countervailing duty law. It remains to be seen whether they will succeed. However, preliminary indications are that the Commerce Department is unwilling to interpret existing law so as to offset the additional amount by which Mexico undervalues its gas.

We believe the most realistic and effective way to deal with the distortions that government monopolies can cause in the marketplace is to amend the countervailing duty law.

These governments are failing to account for their true production costs or are artifically setting prices for production inputs below their real value in order to gain market share and generate export earnings. We need an amendment to existing law to deal with this problem effectively.

Such an amendment should provide for a countervailing duty equal to the difference between the artifical value set by the government for the production input and the reasonable market value of that input. Those market values should be required to be calculated to reflect either "opportunity costs" or, in the alternative, the "residual value" of the input.

In other words, the Department of Commerce should make two inquiries:

(1) How much is the foreign government charging for the input? and,

(2) How much should it be charging for that input with reference to an appropriate market value?

In answering either one of these questions, it may become necessary to construct values. We know of no other way to remove the distortions in the marketplace created by government monopolies.

In closing, Mr. Chairman, we believe that the problem we have outlined represents a growing and pernicious form of unfair trade practice. Congress, we believe, must act quickly to amend U.S. law to set the rules that state-owned monopolies must observe when exporting to U.S. markets. Failure to act promptly invites the perverse result of encouraging foreign governments to adopt state-owned monopoly as the most effective way to compete in U.S. markets.

Chairman **Gibbons**. I am familiar with the ammonia situation. I helped build an ammonia plant as a lawyer. Lawyers are necessary to help build plants, Mr. Frenzel.

I regret that, but they are. I went through all the process of helping them build an ammonia plant, and I realized that the cost of natural gas is the key ingredient.

In Mexico, where they have a lot of natural gas, they have been flaring it off as natural, and turn around and just dump it right into the ammonia process, and then sell at whatever price they can get for the ammonia.

The same thing happened—the reason why we had the additional test on antidumping, as I recall, and maybe, Mr. Rivers, you know more about this than I do, is because the law was concerned about the sulfur that was being given away really from Canada.

Mr. **Rivers**. That is a natural gas problem. That is the byproduct provision in the antidumping where you had associated sulfur.

Chairman **Gibbons**. It is a different test. If you are selling it in a foreign country cheaper than you are selling it at a domestic price, then we got the wrong law to patch up the sulfur thing, and now we are trying to find a way around this.

We haven't found an effective way of dealing with these nonmarket causes.

Mr. **Rivers**. Our problem is gas, but you can substitute for gas, coal, iron ore, and the same type problem can arise even outside the resource based industry context.

Chairman **Gibbons**. One reason our Government has been a little reluctant to get out in front on this is the fact that the Europeans have been claiming we are subsidizing the exportation of manmade fibers because of our controlled gas prices.

So, once you start sinning, it is hard to get out of the mess. We have been having one set of consumers or we have been subsidizing consumers in the natural gas industry for so long we thought it was part of the natural process.

We have got to find our way out of this mess. I hope you will help us.

Mr. **Rivers**. We would like to volunteer to work with you and the staff of the committee in coming up with a reasonable approach to the problem.

Chairman **Gibbons**. We will accept your gratis services and see what we can do to work out something.

Mr. Frenzel?

Mr. **Frenzel**. Who is the ad hoc committee?

Mr. **Rivers**. It is in the statement. The members of the committee are Agrico Chemical Co., Center Plains Industries, First Mississippi Corp., W. R. Grace & Co., International Minerals & Chemicals Co., Mississippi Chemical Corp., Olin Corp., Sohio Chemical Co., Terra Chemicals International, Union Oil Co. of California, and Wycon Chemical Co.

Mr. **Frenzel**. Thank you very much. That is it on the front page of the full statement that will be put in the record.

[The prepared statement referred to follows:]

STATEMENT OF L. L. JAQUIER, EXECUTIVE VICE PRESIDENT, W. R. GRACE & CO. ON BEHALF OF DOMESTIC NITROGEN PRODUCERS' AD HOC COMMITTEE

Mr. Chairman and Members of the Committee:

I am L. L. Jaquier, Executive Vice President of W. R. Grace & Co. and Agricultural Chemicals Group Executive. The Ad Hoc Committee is made up of eleven producers of anhydrous ammonia and nitrogen fertilizers.[1]

U.S. ammonia producers are increasingly unable to compete with state-owned monopoly ammonia producers, particularly the Soviet Union and Mexico. Countries like the Soviet Union and Mexico enjoy the comparative advantage of abundant natural gas resources, as does the United States. Natural gas is the principal raw material or feedstock used in the production of ammonia. Unfortunately for the international trading system--and especially U.S. markets--these two countries have adopted a uniquely trade distorting practice of artificially reducing production costs substantially below those of free market producers.

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[1] The members of the Committee are Agrico Chemical Co., Center Plains Industries, First Mississippi Corp., W. R. Grace & Co., International Minerals & Chemicals Co., Mississippi Chemical Corp., Olin Corporation, Sohio Chemical Company, Terra Chemicals International, Union Oil Company of California, and Wycon Chemical Company.

The Soviets and Mexico supply the natural gas feedstocks to their ammonia plants at arbitrary and artificially low prices totally unrelated to any range of real market values. This allows them to export to our markets at prices below most U.S. producers' production costs.

THE NATURE OF AMMONIA.

Ammonia is made from natural gas (or other substitute hydrocarbon feedstocks) and air, and is virtually the sole source of fixed nitrogen throughout the world. Most of the ammonia in the United States is used as nitrogen fertilizer for agriculture. About one-third of our total food production is dependent on fertilizer. The rest is used to make explosives and other petrochemical products. The value of natural gas used as a feedstock, raw material for petrochemical production must be distinguished from its value simply as an energy source of heat. The cost of natural gas is over two-thirds of the production cost of ammonia in the United States. We estimate that about 75 percent of all market economy producers are currently paying more for their feedstocks than they receive on sale of the ammonia at current world prices.

THE NATURE OF NONMARKET AND MIXED ECONOMIES.

The USSR is a nonmarket economy--a wholly centrally controlled, command economy. The state, of course, owns all the resources. Production is managed by sectors through Gosplan, the state planning agency, which also administers all official prices in the Soviet Union. The state decides what resources will be used for which products, targets capital for development, sets production goals and prices. International trades are made through separate agencies, not the producers. Production is based on volumes rather than profits, and costs are not a factor in external trade. Soviet currencies are not freely exchanged, therefore exchange rates are not determined by foreign exchange markets, but by the objectives of the Soviet State. Prices are set to obtain political objectives and do not reflect market value. These are artificial prices not related in any real economic way to market forces. Prices for basic production inputs are set low--below any comparable values for the same goods or services in market economies.[2]

The Soviets price gas internally at an equivalent dollar value of less than $1.00 at the Soviet set exchange rate. In fact, the actual dollar value is less than sixty cents per MCF. Sales to Western Europe are comparable to BTU equivalent values of oil. In the Section 406 case, we estimated that the value of the gas, based on the Soviets average selling prices of ammonia in the United States, less real production and transportation costs, approached zero even without adding in a charge for a normal profit.

Mexico has a mixed economy, but its energy sector, including basic petrochemical production, is state-owned and controlled under PEMEX--a government monopoly. The Mexican Government has established an Industrial Development Plan that states:

> "This plan is complemented by an explicit policy of maintaining internal prices of energy sources for industrial use below that of the international market. This allows for the strengthening of industry by giving it a substantial margin of protection via inputs.

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[2] Raymond Vernon, "The Fragile Foundations of East-West Trade," 57 FOREIGN AFFAIRS, 1035 (1979).

> In contrast to other forms of protection which tend to make such costs more expensive and access to external markets more difficult, this mechanism constitutes a direct incentive to exports."[3]

A more explicit subsidy scheme cannot be imagined. The Mexicans clearly intend to subsidize production costs and thereby their exports. The scheme is made explicit in the monopoly production and sales of ammonia by PEMEX.

In the case of Mexico, PEMEX uses its gas directly accounting only for its "cost" of producing the gas and transporting it to its ammonia plants. The Mexican Government stated in response to the Commerce Department questionnaire in the CVD case on anhydrous ammonia from Mexico that:

> "There is no sale of natural gas to the Mexican ammonia industry. In its production of ammonia, PEMEX does not purchase natural gas, but draws upon its internal gas supplies."[4]

Thus, PEMEX is valuing the gas for ammonia production at zero or less. The Mexican Government stated in that CVD case that the production and transportation cost of gas used in ammonia is arrived at, indirectly, but it is calculated only after all the financial statements are completed for the previous year.[5] PEMEX does not apply any internal gas price to its production costs based on any conceivable market value, opportunity cost or residual value, even for production of the ammonia for export. PEMEX apparently has no accurate idea of its costs, on any basis let alone on a market-related basis, when it sells its ammonia in the United States. PEMEX pays no tax on the gas it uses in its ammonia production as it does on gas it sells to private industrial users in Mexico. PEMEX also pays no export tax on ammonia as it does when it sells oil and gas and other derivatives in the world market. This has the same effect as if the Mexican Government rebated these taxes to private producers. It also indicates a preference to ammonia exports by PEMEX compared to oil and gas exports by PEMEX. Mexico is able to insulate PEMEX and its economy from market forces in its energy sector only through the use of state ownership of the oil and gas, state monopoly, targeting and artificial price controls.

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[3] IDP at 30 (translated from full Spanish version, excerpt at Exhibit G). (Emphasis added.), p. 17 of Petitioner's Petition in CVD case, ITA Docket No. C201010, Anhydrous Ammonia from Mexico, October 28, 1982.

[4] ITA Docket No. C201010, Anhydrous Ammonia from Mexico, February 1, 1983, Response to Questionnaire, p. 20.

There are other nonmarket and mixed economy countries doing the same thing to one degree or another, but our experience is primarily limited to the Soviet Union and Mexico at this time. These state monopoly producers entered our markets in 1978, and the problem has been growing since then.

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[5] The Mexican Government submitted these calculated costs of gas production and transportation and of its ammonia production on a confidential basis. The government stated in a letter to ITA on March 4, 1983, "Cost system calculations are performed after the annual financial statements are completed. Such calculations have not been made for 1982, and the cost information requested for 1982 is not yet available." ITA Docket No. C201010, Anhydrous Ammonia from Mexico.

INDUSTRIAL TARGETING.

In addition, under their centrally-planned economy and industrial development plans, the Soviet Union and Mexico have intentionally targeted the development of basic petrochemical production, including ammonia production. Both countries have built a large ammonia production capacity well above their domestic needs as well as world market requirements. Their aim is to export large, planned annual volumes of ammonia into world markets, either for hard currency or in countertrade to pay for the plants and facilities themselves, and to capture western markets.[6]

The Mexican Industrial Development Plan specifically targets certain industries, including energy, petrochemicals and fertilizers, for domestic development and for export. The Plan accords these industries the highest priority by maintaining them in the "public sector." The Plan states:

> The public sector companies operate in key areas of the economic structure. Prominent among these are energy producers, basic petrochemicals, iron and steel and fertilizers. These are industries which produce feedstocks of widespread use for their own industry and for the rest of the economy. The availability of these feedstocks allows the industrial apparatus to take advantage of the dynamic effects of the final demand for goods and services. At the same

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[6] "Soviet Chemical Equipment Purchases from the West: Impact on Production and Foreign Trade," NATIONAL FOREIGN ASSESSMENT CENTER, ER 78-10554, October 1978. See also references to Mexican Industrial Development Plan (IDP).

time, they demand a considerable volume of machinery and equipment. Because of that, their expansion is intimately linked to the development of the capital goods industry. Also noticed must be the dynamic direct and indirect contribution of the government-owned industry to the exportation of merchandise, thereby, lessening the traditional restriction that the balance of payments has imposed on the growth of the economy.[7]

On Thursday, April 14, the Labor Industry Coalition for International Trade ("LICIT") testified before this Subcommittee concerning changes in U.S. trade laws to deal with trade problems resulting from the gap between America's approach to its industries and foreign countries industrial policies. These recommendations were based on a recently released LICIT study, International Trade, Industrial Policies and the Future of American Industry. W.R. Grace & Co. is an active member of that coalition, and we recommend that members of this Subcommittee review that report carefully as it examines not only the issue we are discussing in this testimony, but similar problems in a number of other industrial sectors.

THE PROBLEM OF ARTIFICIAL PRICING.

By artificially underpricing natural gas, these governments intentionally lower the production costs of their state-owned petrochemical producers in relation to competing United States and other market economy producers. It would be the same effect as if they charged a market rate--or allowed the market to set the price of gas--then rebated all or part of the cost. Thus, production costs cease to be any commercial constraint on export pricing of ammonia in U.S. markets. What these state-owned enterprises are saying in effect is "sell 500,000 tons (or whatever amount they have planned and have available) of ammonia in the United States this year at whatever price you can get for it." A market economy producer, on the other hand, knowing, for example, that it costs $160 per ton to produce ammonia and takes another $20 per ton to return the investment in plant at a reasonable rate of production, says "sell the most you can at $180 per ton or more."

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[7] IDP as 176 (translated from Spanish version, Exhibit G). (Emphasis added.), p. 22 of Petitioner's Petition in CVD case. ITA Docket No. C201010, Anhydrous Ammonia from Mexico, October 28, 1982.

THE NATURE OF INJURY FROM NONMARKET ECONOMY PRICING BELOW U.S. PRODUCTION COSTS.

These state-owned enterprises then can and do undercut their nearest competitor's price on a consistent basis. They price their exports at or just below marginal costs of United States and other market based producers.[8] These countries export the large, fixed volumes of ammonia without regard to current supply and demand in any market. When overcapacity exists, this oversupplies the ammonia market and pushes the price down.[9] Over the short-term, it might only affect the profits of U.S. producers; however, over the longer term, U.S. producers will be forced to shut down plants. State-owned enterprises operating in this nonmarket manner will consistently suppress U.S. prices below most U.S. producers' marginal costs. This is clearly the case during weak demand periods--seasonal or cyclical. U.S. producers are then forced to shut down production to rebalance supply with demand in order to recover their costs from sales, to say nothing of profit. Unit costs go up as production is curtailed, so losses increase. The process accelerates during periods of weak demand, then abates as demand picks up. This process started in 1978, but after each cycle fewer U.S. plants come back on line.

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[8] Philip H. Potter, "East-West Countertrade: Economic Injury and Dependence Under U.S. Trade Law," LAW AND POLICY IN INTERNATIONAL BUSINESS, Vol. 13, No. 2, pp. 421-422. (1981).

[9] A recent article by a Soviet studies expert, Professor Marshall Goldman, on recent Soviet actions in world oil markets illustrates this process. He states: "How was the Soviet Union able to increase its exports at a time when most other suppliers found it necessary to cut back?....the explanation seems essentially to be that Moscow bought a larger share of the market by cutting its prices sharply on spot markets." The Boston Globe, March 21, 1983, "Who's killing OPEC? The Soviets helped."

This kind of injury will result automatically as our markets force adjustments in supply through price. There is no way we can prevent this result economically. Artificial pricing through targeted state monopolies distorts trade because these state-owned enterprises do not compete on the basis of costs. The market forces of supply and demand do not know this, so they work to reduce excess supply. In a free market, the "high cost" producer--the less efficient producer--should be pushed out, but exactly the opposite can happen in competition with state-owned enterprises which ignore and subsidize production costs. These losses are clearly the result of unfair trade practices not any real economic advantage.

In the Section 406 cases, the International Trade Commission defined material injury, in their discretion, in a way that will not recognize the injury that takes place in competition with nonmarket economies and state monopolies in mixed economies. The material injury test designed by Congress to apply to unfair trade practices by market economies simply will not work in these cases and is unnecessary. The nature of the injury which we described will take place automatically in our markets, and Congress should change the trade laws to declare that such injury occurs automatically.

On the other side of the coin, these suppliers may abruptly drop out of the market or fail to meet deliveries during high demand periods due to technical problems or shifts in economic policies. Invariably, U.S. producers will take the blame for shortages and higher prices. Since disruptions overall are the result of state-owned monopolies ignoring market forces, besides price suppression, loss of market share, excessive plant closures--including plants that are more efficient than Soviet and Mexican plants--U.S. producer capital investment decisions are distorted. There is too much uncertainty in the markets to build for future demand. So the practice becomes a self-fulfilling prophecy.

DIFFERENCES BETWEEN SOURCES OF AMMONIA IMPORTS TO THE U.S.

Ammonia imports to the United States come primarily from the Soviet Union, Mexico, Canada and Trinidad. Urea, an associated nitrogen fertilizer made from ammonia and carbon dioxide, is being increasingly exported to the United States by state-owned enterprises, starting last year. At the present time, it is primarily the state-owned monopolies that are utilizing nonmarket pricing and production practices which result in production subsidies which severely distort trade.

In Canada and Trinidad, there is some government ownership and control over gas pricing. However, one key difference is that, so far, U.S. producers can build and own ammonia plants in Trinidad and Canada. These U.S. producers control the marketing and pricing of their ammonia. They can negotiate at arms' length on the price for the gas on the same basis as domestic producers in those countries. That price has a closer relationship to real market values. By and large, those prices appear to reflect the residual value of the gas used to produce, ship and sell ammonia in local and world markets. U.S. producers account for differences in production costs with U.S. facilities at transfer prices comparable to prevailing costs in the United States. Also, U.S. producers cannot engage in similar predatory pricing practices in the United States based on subsidized production costs, as can the Soviet and Mexican state-owned enterprises. We are not immune from our antitrust laws. We have little doubt that if the prices of ammonia went up in world markets, the price of gas for ammonia production in Trinidad and Canada would go up.

WHAT WILL HAPPEN TO A COMPETITIVE U.S. MARKET?

It may be politically tempting to allow the Soviets and the Mexicans to subsidize U.S. farmers and industry. But the Soviets and Mexicans and other state-owned ammonia producers are unlikely to ever supply all the ammonia and basic petrochemicals we need. When the market reaches that saturation point; when most U.S. producers are out of business and that competition is gone; then those state-owned monopolies will price ammonia the same way they price direct exports of gas and oil, and the price will no longer be cheap. That point could well be upon us within the next couple of years, as demand for nitrogen recovers, and U.S. producers, faced with increasing volumes of subsidized ammonia from these state-owned enterprises, are unable to reopen their plants and recover the 30 percent of production shut down in the last two years. The current PIK program will almost certainly force additional ammonia plant shutdowns this year as nitrogen fertilizer use drops another 18 percent according to the Department of Agriculture.[10] The result will be increased concentration and decreased competition in U.S. petrochemical production and markets. As nitrogen fertilizer prices then rise to cover remaining U.S. producers' costs, these state-owned monopolies will realize "windfall profits" at the expense of U.S. farmers.

If our trading system built upon free and fair competitive market principles is to prevail, the artificial low pricing of key production inputs, such as natural gas feedstocks, by state-owned monopolies must be clearly identified as a subsidy prohibited by U.S. law and international trade rules.

COMPARATIVE PRODUCTION EFFICIENCY AND COMPETITIVENESS.

U.S. ammonia producers now operate the most efficient plants in the world, yet we cannot compete and have been forced to shut down ammonia production in the last five years way beyond the levels dictated by demand from U.S. farmers and for exported fertilizer. Demand in 1982 was at its lowest point in years, and yet these imports increased, not only over the last five years, but even in 1982. The U.S. industry built a lot of new plants and scrapped old plants in the late 1970's. We run our plants much more efficiently than the Soviets and the Mexicans, who have bought the same large western plants and technology that we have. We do not have to transport our ammonia long distances--even in government-owned and subsidized ships--yet we cannot compete. Admittedly, they do not have to make a profit, but even that factor should be offset by U.S. law, and that factor alone should not give state-owned enterprises such an overwhelming competitive advantage. Then how can these state-owned enterprises increase their sales at prices below U.S. production costs? THE GREATEST DIFFERENCE IS THE COST OF GAS.

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[10] USDA Report cited in GREEN MARKETS, "USDA Now Expects Fertilizer Use to Fall 12-14% This Year with PIK," Vol. 7, No. 14, April 11, 1983. McGraw-Hill, Inc. "The report noted that, 'With the (fertilizer) industry already suffering from serious excess capacity due to slack demand and increased imports, some additional production facilities--primarily ammonia plants--are likely to close. Since prices are also likely to soften, the drop in fertilizer manufacturers' revenues is also likely to be greater than the decline in use.'"

These countries do not have more gas available to produce ammonia and petrochemicals than we do. They price it differently. They may not yet have as much demand for gas in their countries as we have in the United States, but they do have substantial and increasing domestic demand, and they do export gas and make petrochemicals. They have some comparative advantage in natural gas relative to the United States, but not much; certainly not nearly enough to account for the huge difference between domestic and export sale prices of gas. These countries apparently believe gas is worth nothing or even less than nothing when they use it at home to make ammonia. They also clearly believe ammonia is worth a lot more when they sell it to us than when they sell it in their own countries. If they let it work, do you think the marketplace would value the gas or ammonia that way? Of course not! Any comparative advantage that the Soviets and the Mexicans have in natural gas for petrochemical production is not much of one and is declining rapidly. Their government-controlled artificial pricing system, industrial targeting, and use of state monopolies are the advantages they are using. But those advantages are clearly unfair trade practices which are, in effect, subsidizing their exports.

Obviously, these countries can adopt any economic system they want, they can nationalize all their natural resources, they can use state-owned monopolies to produce petrochemicals, they can subsidize their economy for whatever social and political reasons they choose. These practices have weakened their economies and practically bankrupted Mexico, but that is still their affair. We do not believe we will get them to change much anytime soon. THE RULES SHOULD CHANGE WHEN THEY ENTER OUR MARKETS.

Nonmarket economies and state-owned enterprises which operate under nonmarket principles in mixed economies should not be allowed to export their subsidized products with impunity. We are required to rely upon the market forces of supply and demand to determine the cost of production, prices, sales and profits. Yet nonmarket economies and state-owned monopolies in mixed economies apparently do not have to play by those rules when they sell in our markets.

Neither of these countries are members of GATT. Neither has signed the Subsidies Code. Neither has any effective bilateral trade or subsidies agreement with the United States. The Commerce Department recently tried to get such an agreement with Mexico including restrictions on subsidies for basic petrochemical production and export. The only concessions the Mexicans were willing to agree to were meaningless. Neither Mexico nor the U.S. Government negotiators were willing to deal with the massive subsidies provided by PEMEX to the Mexican economy. But those practices distort our markets when they export products substantially affected by those subsidies. A recent 1981 study on Mexican energy policies makes it clear that the explicit policy of undervaluing oil and gas and derivatives, including basic petrochemicals, has artificially reduced PEMEX revenues and has forced PEMEX and Mexico to borrow excessively, creating inflation and devaluation of the peso, and now the inability to pay their debts. These subsidies have also had the effect of forcing overexpansion of PEMEX and concentration in capital-intensive industry rather than labor-intensive enterprises causing further losses to the economy.[11] We understand Mexico is now seeking new negotiations on a subsidies agreement. Any agreement must recognize the nonmarket nature of the energy and petrochemical sector of the Mexican economy, and if they are unwilling to change, U.S. law should offset any unfair trade practices resulting from those nonmarket practices.

I do not believe it is necessary to detail to this Committee the trade problems we have had with the Soviets over the last ten years.

THE OBVIOUS SOLUTION.

We believe the effective way to prevent this result is if U.S. trade law can intervene and levy a charge on such imports that equalizes the artificial price of the gas (or other production inputs) with what it would be if market forces set that price. We cannot naively assume these countries will change their economic systems, and our economic system cannot offset this artificially contrived difference. A fair duty can be calculated which would offset the difference between this artificial or nonmarket price and a fair market price which would still recognize a comparative advantage, if any. The process should also recognize higher production efficiencies in the United States and other market economies.

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[11] U.S. Mexican Energy Relationships; Ladman, Baldwin, Bergman; Lexington Books, 1981; pp. 98-105. D. C. Heath and Company.

There is no way to make a precise calculation of the "market price" to determine the amount of such a duty where a government has effectively blocked the actual operation of market forces throughout the economy or in a particular sector like energy. Economists tell me that a very close approximation can be made, however, in either of two ways.

One is to calculate the "opportunity cost" of the gas or production input. This is, in effect, the amount of revenues sacrificed or foregone by a government by using gas at an artificially low value to make ammonia, rather than selling it to another producer or user for a different purpose. Mexico could, for instance, sell more gas to the United States, though probably at a lower price than the current rate of $4.94 MM/BTU. In fact, recent reports indicate that Mexico plans to double its pipeline capacity to the United States in 1984 and increase to its maximum capacity to 1 billion cubic feet per day by 1985.[12] Conservative estimates indicate that a reasonable commercial benchmark or opportunity cost for Mexican gas sales to the United States would range from $2.70 to $3.50 per MCF. PEMEX instead sold gas to industrial users at an average of $0.43 in 1982 (Jan. 1-Sept. 30) and provided gas to itself to make ammonia at even less. In this example, the opportunity cost "lost" by Mexico is around $1.60 per MCF (average of $3.00/MCF - $0.43 = $2.57 - $0.90 to $1.00/MCF transportation cost to the U.S. border). The subsidy on a metric ton of ammonia would be around $68 per metric ton ($1.60/MCF x 42.3 MCF/metric ton = $67.68).

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[12] Natural Gas Intelligence, Vol. 2, No. 27, March 21, 1983.

The second way to determine the value of gas received by PEMEX in its sales of ammonia, domestic and export, is to calculate residual value or derived demand. This requires nothing more than to take the weighted average value of all sales of ammonia by PEMEX, domestic and export, and subtract all manufacturing costs, except the value of the gas, and including depreciation and overhead, and a reasonable profit. The remaining amount is what a producer of ammonia should be willing to pay for the gas. He would not pay much more since that would reduce profits. He would be glad to pay less. The problem is PEMEX is the gas producer and seller and the ammonia producer and seller. This residual value calculation on PEMEX'S total ammonia sales, using any reasonable profit calculation, results in a large negative value. We estimate that negative value to be, conservatively, around $50 per metric ton. PEMEX'S selling price is so low that they are not covering normal production costs, even before taking account of the value of the gas. This means that Mexico would have to pay any private Mexican ammonia producer that amount per ton and provide the gas at a zero value, collecting only PEMEX'S production and transportation cost to get the gas to the plant, to induce a private producer to make and sell ammonia on the same terms as PEMEX. And that is figuring a before tax profit at no more than you would make if you invested your money in U.S. Treasury Notes, risk free, rather than in an ammonia plant.

Thus, the simple solution appears to be to charge a duty on the difference between the artificial price and the market value of the key production input--natural gas. This, we have discovered over the last four years, is easier said than done under U.S. law.

DUMPING OR SUBSIDY.

The Soviet Union and Mexico artificially lower production costs for ammonia as well as some other energy based products. The Mexicans clearly intend to subsidize production costs and, thereby, exports in these sectors. Both the Soviets and the Mexicans have targeted petrochemicals, and particularly ammonia, for excessive development and export. They have established state-owned monopolies to implement these policies directly.

The Soviet economic, social and political system is completely contrary to ours. It is much more difficult--some say impossible--to reach such a production cost subsidy by the Soviet Union. No CVD cases have been brought against the Soviet Union in recent memory due to these difficulties. U.S. trade remedy laws should clearly reach this practice, and we believe the countervailing duty is the most appropriate. We also believe the CVD law can be amended to deal even with nonmarket economies in a fair and reasonable way.

Legally and procedurally, it has been suggested that it is easier to reach these practices under the antidumping laws by constructing a market value based production cost of ammonia and comparing that "cost" to the prices at which Soviet and Mexican ammonia is sold in the United States. Such an approach is essentially the flip side of the coin in trying to determine the net amount of the production subsidy in a countervailing duty case.

The Chairman of the International Trade Commission suggested such an antidumping approach as an alternate remedy to allegations in a Section 337 case filed against PEMEX and FERTIMEX on exports of ammonia to the U.S. The case was filed by CF Industries, and they have given testimony to this Subcommittee on these issues last month in this same set of hearings. CF Industries strongly objects to the ITC ruling in that case. The ITC failure to initiate that case, over which they admittedly had jurisdiction, is before the U.S. Court of Appeals for a Writ of Mandamus. One of the major reasons on which ITC relied was the suggestion that these allegations indicated a dumping claim, even though the Commerce Department official responsible for administering the antidumping law indicated there was no such indication based on the allegations. The Commerce Department did initiate a countervailing duty case brought by W. R. Grace and Co.; Olin Corp.; First Mississippi Corp.; and Mississippi Chemical Corp. A preliminary determination in that case was entered March 29. That determination found that one of PEMEX'S gas pricing actions was a countervailable subsidy. But Commerce rejected the major artificial gas pricing action by the Mexican Government as countervailable simply because it was made generally available to all industrial users in Mexico, rather than to just a "specific industry." Commerce failed to even consider whether that price was commercially reasonable or below any reasonable market value of the gas used in ammonia production. A final decision is due in June.

Realistically, this practice does not constitute dumping as it is traditionally defined. Sales at less than fair value have been pretty narrowly defined as sales below home market prices or at less than production costs. In the case of Mexico, the Government owns the gas and PEMEX and fully controls the prices of gas, oil and petrochemicals produced by PEMEX. The Mexican Government lowers production costs of ammonia in the first instance simply by setting a very low value for the gas used--a value admittedly below its market value. PEMEX also sells ammonia to farmers and industrial users at less than its cost and at a fraction of the price it sells it in the United

States, even though that U.S. price is currently below almost every U.S. producers' costs.

It would appear almost impossible for PEMEX to sell ammonia in the United States at less than its home market price or less than the production costs for which it accounts. If the Commerce Department or ITC can determine what the fair market value of the gas should be in order to construct a production cost for an antidumping case, they can just as easily determine what the net subsidy actually is in a CVD case. Reality clearly defines the government practice of undervaluing gas as a feedstock to make ammonia as a production subsidy enabling PEMEX to sell its ammonia in the United States for less than U.S. producers can sell it and make a profit. That process on its face does not appear to be a sale of ammonia for less than production costs.

Frankly, if the Congress decides to change the law to treat this as a dumping problem, it should amend it to provide for a constructed value of production costs that is based on fair market values, including U.S. values, and not on some fictitious process in some other surrogate country that has no relevance to the U.S. marketplace, or Mexico, or the Soviet Union. If the Committee is going to go this way, the constructed value provisions should also permit relevant market values to be used in constructing production costs for both dumping and countervailing duty calculations. The residual value backout calculation should be specifically authorized to calculate the extent of subsidies or the value of specific production inputs as utilized by state-owned enterprises under administered pricing systems. The use of the constructed value approach should also specifically be authorized in analyzing nonmarket sectors of mixed economies. This is at least the first step to clarifying that the law requires state-owned enterprises to pass certain market tests in treatment of production costs and pricing; and, if they do not, that U.S. law will assess a duty on that difference between what they do charge as costs and what they should charge in market terms.

We also object, however, to the export price merely being compared to the lowest price in the U.S. market on the theory that such a price represents the most efficient producer. This was the theory behind Senator Heinz' artificial pricing bill, S. 958, in the last Congress. That premise is often not correct. It clearly is not correct where more than one state monopoly producer is in the market. Also the definition of injury would have to be clarified to cover the kind of injury and threat of injury that actually occurs.

The Synthetic Organic Chemical Manufacturers Association (SOCMA) has submitted testimony on this approach to the problem to this Subcommittee in this current set of hearings.

NONMARKET ECONOMIES AND STATE-OWNED ENTERPRISES CANNOT HAVE IT BOTH WAYS.

We do insist that these nonmarket economies and state-owned enterprises and state monopolies in mixed economies cannot have it both ways. Those countries, which have adopted these nonmarket practices, should not be able to avoid antidumping cases by artificially lowering production costs for their own monopoly producers below market values. This allows them to sell below our production cost but, technically, not below their own. Artificial pricing also allows them to set very low home market prices. Thus, such producers avoid sales at "less than fair value," yet can still price their exports below any price U.S. producers can match. If they do so, they cannot conversely be allowed to claim that the lowering of production costs by artificial pricing, or not accounting for the market value of production inputs, is not a subsidy and that the CVD law does not apply because they are a government and can set those prices at any level they choose.

We cannot believe that this was the intent of Congress. Yet this appears to be the result under current interpretations of the CVD law, unless the Commerce Department changes its ruling in the pending CVD case on ammonia from Mexico in its final determination. We believe the ITA has clearly misinterpreted the law and the intent of Congress in this case so far.

We do not intend to argue the pending CVD case on Mexican ammonia before this Committee prior to the final determination. It is relevant to point out one of the major issues raised in the preliminary determination, however, that is fully within the scope of these hearings. The Mexican Government sets the price of gas to industrial users in Mexico. It applies to all users unless they get a special regional discount, in addition. The Commerce Department found that PEMEX accounts only for its "costs" of producing and transporting gas to its ammonia plants which are less than the industrial use rate charged all other producers. They found that was a "preferential rate" to a "specific industry" under the 1979 amendments to the law.

They went on to say, however, that the difference between the domestic price of gas--the Mexican industrial use rate--and the export price--which was the only evidence of a market price for comparison--was not a countervailable subsidy, because it was "generally available" to all industrial users and, therefore, not a "preferential rate" to a "specific industry."

This was a rate set by the government, not through any market forces. It was a rate set intentionally below market values as a "direct incentive to exports." Commerce made no attempt to argue that this low rate was the "commercial benchmark" for determining the existence of subsidies. They made no attempt to determine if any other truly commercial benchmark existed or could be determined. They made no attempt to calculate an "opportunity cost" of gas or a "residual value" of gas as they have recognized in other cases involving government sales of state-owned resources at government set prices. Even Mexico recognizes it was undervaluing its gas when it started to raise its prices dramatically in July of last year. So, that price would clearly not be an appropriate commercial benchmark.

The Commerce Department ignored the old law, which clearly still applies to Mexico since they are not a country under the agreement. But Commerce apparently believes that, now, all domestic production subsidies come under the 1979 amendments. They then interpret those amendments to narrow and reduce the application of countervailing duties to domestic production subsidies when the clear intent of Congress in 1979 was to expand its application. We merely cite this as an additional instance where the trade remedy agencies are misinterpreting the law and ignoring the clear intent of Congress. I understand this problem is nothing new in the administration of the countervailing duty and antidumping laws.

COMMERCE DEPARTMENT RULINGS ARE PRODUCING A PERVERSE RESULT.

If, through these kinds of pervasive government economic controls, a government can set a very low price for something like natural gas or fuel oil below any reasonable range of its true market value; and that artificially lowers production costs for targeted industries for the purpose of providing a direct incentive to exports; and that is not a countervailable subsidy under our law simply because the government makes it available to all industrial users; then our law is producing a very perverse result. It encourages the use of artificial government price controls, state monopolies and state-owned enterprises to implement such practices. Obviously, the market would not set such a price, but at least some market value test should be applied to see if the government set price was comparable. Such countries avoid both the countervailing duty law and the antidumping law, and U.S. producers have no defense.

SUCH PERVERSE RESULTS COULD NOT HAVE BEEN INTENDED BY CONGRESS.

I find it hard to believe that it was the intent of Congress to allow a government monopoly to artificially set low prices for key production inputs in order to lower their production costs; the effect of which allows their producers to avoid dumping; and, on the other hand, exempt that government monopoly, or producers buying from it at subsidized prices, from liability under the countervailing duty law simply because it makes that same artificial price generally available to other industrial users. I realize we must draw the line somewhere on domestic production subsidies, but this can hardly be the place to draw it. If this is the law, then it must be changed or we will have destroyed efficient U.S. producers in favor of foreign government monopolies. That result does not seem to us to be very good trade policy or economic policy for the United States, if we want to maintain any semblance of a market based economy here and in world trade. These problems are all compounded, by the way, when nonmarket economies use countertrade to sell these goods bilaterally in market economies.

INADEQUACY OF OTHER U.S. TRADE REMEDIES.

With regard to the Soviets, the Ad Hoc Committee filed a Section 406 case against Soviet ammonia in 1979. I am sure I do not need to detail the fiasco of the Soviet ammonia cases to members of this Committee. Those cases produced at least as unsatisfactory a result as the Polish golf cart case.

Everyone agrees that Section 406 is unfair to exporting countries, importers and domestic producers alike. Even the political decisions that were the overriding factor in those cases ended in conflict.

Even though the second case reversed the finding of market disruption in the first case, the ensuing conflict in trade relations with the Soviets as a result of the grain and fertilizer embargo has reduced Soviet ammonia sales below the quota levels called for in the Occidental countertrade. We fully expect ammonia and urea imports from the Soviets to rise simply because they have built so much excess capacity that they must export. They are reportedly building more new plants in the midst of the worst fertilizer market in years. Finally, they will export to the United States, because we are still the largest single fertilizer market in the free world, and they can undercut U.S. prices any time they choose to sell whatever amounts of ammonia and urea that their current Five Year Plan calls for. Currently, they are still attempting to countertrade much of their ammonia.

Recent reports indicate that the Soviets and Occidental have agreed on a price for 1983 sales of ammonia at around $143/metric ton, c.i.f. U.S. Gulf, which is $129/short ton. That undercuts the recent increased Mexican asking price of $155/metric ton - $140/short ton. It also undercuts U.S. producers' recent f.o.b. plant prices in the Gulf area. Both prices are still below most U.S. producers' average total costs. And demand is still dropping for ammonia under PIK.

The critical decision in the 406 cases was the opinion that no "material" injury was occurring, nor was there threat of any such injury caused by Soviet imports. The then majority on the ITC defined injury in a way that required a showing of specific lost sales, jobs, etc. Even threat had to be "real and imminent," which was, in effect, within a few months. They refused to accept that the Soviet practice of consistently pricing at or below U.S. producers' marginal costs and offering fixed quantities of product inconsistent with the supply demand balance was causing any injury or threat thereof. These practices suppress prices long-term, because sales are made on a long-term basis, thus insensitive to demand shifts in a seasonal commodity-type market. Prices will ultimately be pushed down to or below U.S. producers' costs, and imports will then displace U.S. production. It is simply cheaper to buy Soviet or Mexican imports than to make ammonia at a loss, or at best no profit, so you shut down your plant. That causes injury. It does not happen overnight. It does not result from a "flood" of imports. It occurs more rapidly when demand growth is weak or declining, but it will occur in any event. The damage is limited only by the amount of ammonia the Soviets and Mexicans decide they want to sell in the United States.

You should also know that we actively discussed a Section 201 case with USTR at the time the President was considering whether to approve or reject the quotas recommended in the first 406 case. The USTR concluded that a Section 201 against all ammonia imports was not appropriate, since most other countries importing to the United States were not using nonmarket and state monopoly practices in selling ammonia to the United States.

We have previously outlined the current inadequacies of and pending questions concerning the countervailing duty law, the antidumping law and Section 337, as those statutes are being interpreted by the Commerce Department and the ITC with regard to Mexican ammonia. The CVD case and the Section 337 case are still pending before the ITA and the courts. We obviously believe these agencies are not following the intent of Congress in their current interpretations of these laws. We are also concerned whether current law can adequately reach nonmarket economies, like the Soviet Union, when they engage in the same kinds of action.

One of the major weaknesses of Section 406 and other similar statutes is the amount of political discretion that is exercised in overruling cases like these due to foreign policy and national economic interests. When relations are good, there is a reluctance to upset them, and when they are bad, there is a reluctance to make them worse. It is sort of a "heads they win, tails we lose" proposition. For this reason, we have concentrated primarily on the countervailing duty and antidumping laws.

We also point out the problem with current "material injury" interpretations, which have been determined by the ITC not to reach the kind of injury that occurs from these practices, our views to the contrary. It does not take a separate finding by a separate agency to determine that this injury is occurring or will occur in this type of case. It will happen automatically. Our market forces assure it, once this type of practice starts. The law should simply recognize and declare that the injury flows from the artificial lowering of production costs and these monopoly practices.

Thus, in one way or the other, we have tested the antidumping and countervailing duty laws, Section 406, Section 201 and Section 337. While it appears from the language of the statutes that the CVD law and Section 337 should apply in the Mexican case, they probably cannot be fairly utilized to offset production subsidies by the Soviets in their current form.

LEGISLATION NEEDED.

All of our learning experience over the last five years indicates that the most realistic and effective way to deal with the artificial lowering of production costs by nonmarket economies and similar nonmarket actions by government monopolies in a certain sector of a mixed economy, is to amend the countervailing duty law.

This law, like the antidumping statute, purports to eliminate the sort of political second-guessing that overrules agency decisions through Presidential review. That sort of review simply is not necessary in this type of case. The political problems that arise by a review of foreign policy or economic interests when a foreign government is acting directly as a producer and directly controlling its economy are impossible to resolve fairly. If those governments are going to act like a producer--particularly a monopoly producer--they should be treated under our law like a monopoly producer not a government, per se. These actions should not be subject to the standard complaint that we are interfering in their internal political policies. They choose to act as government monopoly producers and state-owned enterprises and export those monopoly practices into our markets, along with their products. They cannot be held to be immune simply because they are a government.

These amendments should specifically provide an offset in the form of a duty on the difference between the subsidized value of any production input and the reasonable market value of that input. Those market values should be required to be calculated to reflect either "opportunity costs" or, in the alternative, the "residual value" of the input.

In making these market value or artificial price calculations, a constructed value approach should be required where actual values are not provided or are inadequate to determine actual costs, as provided by the nonmarket or mixed economy government in question. That constructed value should be required to use reasonable market values from market economies, including the United States, for the components of manufacturing costs, fixed and variable, profit levels, and opportunity costs or residual values. The surrogate country approach should be eliminated. The components of these elements should be specifically spelled out in the statute. In this way, certainty is provided and any one of these countries that wants to can calculate for themselves what their export prices to the United States should be.

These special provisions should apply specifically in the case of state monopoly producers or state-owned or controlled enterprises in addition to nonmarket economies. They should also apply where the government, the state monopoly producer or the state-owned enterprise is providing a production input at a less than market value cost by reason of government action to a private sector producer and exporter in that country. The standards of opportunity cost and residual value should be clearly applicable in such cases, without regard to whether the government subsidized production input or cost is provided to a specific industry, or group of industries. It should apply even when the government set price or subsidized production input is available to all industries if the input is specifically used by the producer, which then exports its products to and sells them for less in the United States.

If the components of direct production costs are defined, it eliminates problems with general infrastructure types of government goods and services.

Discriminatory taxation or the foregoing of taxes for certain products (such as taxing oil and gas sales, domestic and export, but not ammonia sales), particularly when produced and sold by the same government entity, should be clarified as countervailable under the CVD law. This should apply particularly when the government is actually just appropriating the net revenues of its producer. Mexico, for instance, levies "taxes" on PEMEX that appropriate 99.5 percent of PEMEX'S net revenues. By ignoring some such revenues by product category, the government is simply implementing its production cost subsidy and export scheme.

In the event a countertrade is involved, both sides of the transaction must be reviewed. The potential problem is that the nonmarket economy government could "pay" a higher than market value for the U.S. goods, and the U.S. partner in the trade could then pay a higher value for the countertraded goods. The U.S. partner could then sell at a lower price in the U.S. without incurring a real "loss." The market economy partner should be deemed a "related party" in such instances, in order to look at the whole transaction.

Injury should be deemed to occur in these types of cases, since it will flow automatically from the operation of market forces in these kind of monopoly trade practices. That injury is the undercutting of U.S. producers' prices through the addition of excess, artificially fixed supplies into the market without regard to demand. These nonmarket monopoly producers ignore costs and concentrate instead on the sale of a certain volume of goods within a specific period of time. This process will suppress prices consistently down to or below U.S. producers' marginal or average total production costs. Invariably, it is then the U.S. producer that must cut back production or suffer prices below its costs. We are injured both ways, and it simply is not fair.

Finally, the ultimate, though not preferred, solution, where it can be shown that production subsidies are occurring, but they cannot be accurately or fairly measured, is to authorize quantitative restriction. Such remedies are now available in certain instances under the 1979 amendments to the countervailing duty law. Such a remedy is even more appropriate to nonmarket economy and state-owned monopoly cases, where adequate commercial information is not available and the required economic tests cannot be made.

The principal requirement, however, is to clarify the definition of subsidy to make it clear that it covers the lowering of production costs, or the assumption of losses, by the artificial pricing of key or significant production inputs by nonmarket economies or by mixed economy governments using state-owned enterprises or state monopolies. Such a clarification should also apply to such government subsidies when provided to private producers which then export, if the same elements are present.

Chairman GIBBONS. Well, we thank you very much for coming and helping us.

Our last witness for this hearing is Mr. Shewmaker, who has been sitting here from the beginning. I have had my eye on you back there, Mr. Shewmaker, and I recognize your expertise and your skill. We are going to put your entire statement and summary in the record.

STATEMENT OF RUSSELL N. SHEWMAKER, WASHINGTON, D.C.

Mr. SHEWMAKER. I hope there is some virtue in being last.

Chairman GIBBONS. Well, I guess—I do not know.

Mr. FRENZEL. If the Bible is right, you will be first.

Chairman GIBBONS. Go right ahead, Mr. Shewmaker. I have been looking over your statement. I think you have got some good suggestions there.

Mr. SHEWMAKER. I would like to say a few prefatory things and then explain how I propose to skip and jump in the pages. I obviously cannot read this whole statement, nor would I intend to try.

Chairman GIBBONS. No; as I said, you know, I sit up here and sometimes when some of the other members are talking—members, I do not mean witnesses—I read the other testimony, and I have been looking yours over. It is good.

Mr. SHEWMAKER. Thank you.

Thank you for the opportunity to appear before the Subcommittee on Trade to offer comments on and suggestions for the improvement of the Nation's trade remedy laws and their administration. In the subcommittee's notice of February 15, it stated that the subcommittee is particularly interested in determining how the expense and time involved in processing cases under current procedures might be reduced in order to insure U.S. industry and labor, including small business, access to trade remedies.

At the outset, I wish to explain I am speaking for myself. This is a pro bono statement. I have no client interest. Prior to my retirement from the U.S. International Trade Commission in January 1981, I have had almost a half century of Government service in positions dealing with U.S. foreign trade laws and their administration. On the strength of this background experience, I am pleased to offer my comments and suggestions to the subcommittee.

The seeds or beginnings of current trade problems can be identified in the divergencies of U.S. foreign trade policy in recent years which culminated in the enactment of two omnibus measures, the Trade Act of 1974 and the Trade Agreements Act of 1979.

The Trade Act of 1974 delegated to the President a series of far-reaching negotiating and rate-changing authorities, and in section 151 introduced the so-called fast-track congressional procedures for the legislative implementation of nontariff-barrier agreements concluded by the President.

The Trade Agreements Act of 1979 is a comprehensive fast-track implementation of numerous Presidential actions taken mostly under the 1974 Trade Act.

The problems involved are formidable and fundamental. They pervade the whole of the governmental structure devoted to development and administration of U.S. trade laws. The problems include the following: (a) substantive deficiencies and needless procedural complexity introduced in the provisions of the Trade Agreements Act of 1979 implementing the Tokyo round of GATT-trade negotiations; (b) failure of the foreign trade agencies to develop the requisite relevant, reliable product-oriented pricing, and other data for making informed, responsible decisions on the many trade matters that arise from day to day; and (c) the misuse of the U.S. trade remedy laws.

The problems in (a), (b), and (c) are a consequence of many factors, including poor, ineffective leadership, the absence of requisite technical and professional expertise, manpower shortages, especially at the U.S. ports of entry and exit, poor coordination of inter- and intra-agency functions, and flagging morale in the trade-agency staffs. Inevitably these factors, taken together with the problems generated, have seriously undermined the credibility of the U.S. trade decisions and the position of U.S. leadership in the world trade community.

In stating that, I realize that is quite an indictment, and I am sorry to say I truly believe that it is true, but in getting at the problems that you have raised, I would like to go to the very end of my statement, where I say the United States should actively pursue its GATT goals as expressed in sections 107 and 121 of the Trade Act of 1974. In other words, section 121 gives authority to the President to bring all trade agreements entered into by the United States into conformity with principles promoting the development of an open, nondiscriminatory, and fair, world economic system.

Now, this goal, if it is paramount, then all I can say is that in the Tokyo round it was wholly neglected. I refer to the admonishment of Mr. Ehrenhaft that you not legislate in haste, and with that I wholeheartedly concur. I might say in this regard that my 27th suggestion says that any bill on the subject matter of this hearing should include a provision repealing the fast-track provisions in section 151 of the Trade Act of 1974. I think those provisions aimed at getting something done, rather than having individual matters pend for a long time. It is well to get things done, but I do think they should be done in a manner that assures quality, and I do not think what happened in connection with the Tokyo Round did give us quality performance or anything that remotely corresponds with the development of an open, nondiscriminatory, and fair, world economic system.

I refer to the remarks of Mr. Suchman about the problems of maintaining proper agency staffing. I think the continuity and the official memory with respect to trade matters dissipated along in the 1970's and I think that we have a long haul to go in terms of recruiting and training and trying to get this career staffing. I think almost any governmental function, and trade in particular, does call for continuity and planned change, not the kind of change that comes by accident or as a result of ignorance, but change that is done on the consideration of where you are at a given time and where you want to go, and if change is necessary, you make it in an orderly, constitutional way.

I think you can achieve that in trade only if you have in place and in position to replenish itself from time to time, a cadre of trade experts, trade professionals, lawyers, technicians, and others who are in a position to tell any administration that comes into power what the facts and law are on a given issue. Then if that administration contemplates taking action that requires legislative change, it should proceed accordingly, rather than by engaging in a dubious technique such as interpreting black to include white.

So, it is within that context that I am looking at this matter to the end that this country, which originated the trade-agreements program and nurtured it through many difficult times, will continue to work within the GATT provisions that have evolved, because it is the only hope that I see for the resolution of world-trade problems in an orderly and proper fashion.

Now, within that context, I look at the escape clause which was born out of the necessity of getting the trade-agreements program continued. It was a bipartisan effort that assured the continuation of the GATT program and the trade-agreement process. It is important to look at the escape clause and then, as a complement, at dumping and countervail, and, if you will, section 406 on market disruption. They are to me the provisions that deal with the common, run-of-the-mill situations. To me, it is a travesty that the automobile case was brought under the escape-clause provisions. To me, it is a travesty that steel was brought under the antidumping and countervail provisions. We have to complement these run-of-the-mill types of jurisdictions with the extraordinary ones relating to national security, international economic emergencies, and the special authority in the Trade Act of 1974, to deal with balance-of-payments problems.

Chairman GIBBONS. Yes.

Mr. SHEWMAKER. Now we have thrust on the scene section 301 of the 1974 Trade Act, as another way to restrict U.S. imports on a global basis. This has significantly bad implications in terms of a recent action, which I will get to in a minute, dealing with specialty steel. But look at the escape clause. Look at dumping and countervail. Then look at these extraordinary remedies, and what you find is that, in the period of greatest economic distress since the Great Depression, there have been no cases brought under the international emergencies legislation. The national security provisions have been the private domain of petroleum. The only unusual action that was taken was when President Nixon imposed the surcharge on U.S. imports, and he used the Trading with the Enemy Act as the basis for it. It sounded ridiculous—the name of the act had unfavorable implications that we were dealing with enemies, not trading partners. The act used previously by President Roosevelt as authority to close the banks in 1933. Understandably, that part of the act relied upon by Presidents Roosevelt and Nixon was reenacted in the provisions of the International Emergency Economic Powers Act of 1977.

In any event, I do not know why they take these prosaic-type import remedies and try to mold them into something which they are not. The escape clause is protectionist, pure and simple. It is a vestige of Smoot-Hawley or whatever you want to call it, and the United States is the one that put the escape clause in the GATT and other U.S. trade agreements.

Now, to complement the escape-clause procedures, you have antidumping and countervailing duty procedures, the latter since the import-injury requirement was added thereto.

They are unfair. When you invoke the escape clause, you expect to compensate the other contracting parties, because of the implications of it as protectionism. It is antithetical to the trade agreement process, but nevertheless it is one of the practical realities that we live with.

Now on dumping and countervail, we have price discrimination, and price discrimination means unfairness that you find in the marketplace. In the administration of the escape clause and price discrimination, it is imperative that the differences between fair imports, on the one hand, and unfair ones on the other, have a good, clean line of demarcation that can be explained. What do we have? In the U.S. administration of these provisions, we have nothing remotely suggesting that attention is being given to the refinements that are relevant.

I gave you a supplement because as so often happens when you are talking to yourself you leave something out that you meant to put in. In my supplemental statement I added something to give some substance to a simple statement that I had made in my eighth suggestion, viz, that most of the problems associated with the dumping and countervailing duty laws are inherent in the provisions therein for their dual administration, and that one-agency administration is a necessity. I do not think that the Department of Commerce, as an advocate trade agency, should have anything to do with the remedy laws, and I think that that is one good reason to get them out of it. But to get a single agency doing it is important because, as I say, the dual administration is the source of most of the problems.

I will give you an example. The dual-agency syndrome begins when the petition is filed. The law provides that the petition shall be filed with Commerce and on the same day a copy thereof shall be filed with the Commission. It further provides that Commerce shall within 20 days thereafter determine whether a formal investigation is warranted. The statute assigns no role to the Commission in connection with the initial determination of the sufficiency of the petition, but, strangely, does provide that the petition may be amended at such time and upon such conditions as Commerce and the Commission may permit.

Under prior law, Treasury determined the sufficiency of the petition, but before doing so, promptly provided a copy thereof to the Commission for the purpose of obtaining informal assistance, particularly with regard to defining the product scope of the potential investigation and assessing the information submitted in support of the allegation of import injury.

Now, however, it is the questionable if not illegal practice of the Commission to institute a preliminary investigation immediately upon receipt of its copy of the petition, without waiting for Commerce to make its determination as to the sufficiency of the petition. Not uncommonly, the product scope of the Commission's notice, and of that subsequently issued by Commerce, is different—a situation that could possibly result in a judicial invalidation of an antidumping or countervailing duty order issued at the conclusion of an investigation.

The Commission's practice is questionable in other respects. With the premature publication of the notice commencing its preliminary investigation, the Commission also submits to domestic producers, importers, wholesalers, et cetera, questionnaires which as I had explained in the May 4 submission are deficient in the pricing data they seek. Now, I can illustrate this in terms of responding to one of the matters the notice said the committee was interested in, that is: improving administration of the antidumping and countervailing duty laws to make these important remedies less complex, costly, and time consuming for all parties, that is, simplification of calculation procedures, curtailment of interlocutory judicial review, and modification of preliminary determinations.

I wholeheartedly agree that we should curtail or eliminate interlocutory judicial review, get rid of preliminary determinations, but getting to calculation procedures, I do address that in this supplemental statement beginning on page 3. I say the subcommittee's notice asked for comments on proposals it had received for the simplification of calculation procedures. It is assumed that this has reference to the procedures for calculating the margins of subsidization and the margins of dumping. In this regard it is suggested that simplicity is not an end in and of itself. Indeed, Commerce and the Commission have achieved the ultimate in simplicity with their weighted-average pricing methods, as applied, for example, in the investigations of the basic shapes and forms of carbon and specialty steels. In these investigations, the varying prices of hundreds of diverse products have been regimented willy-nilly into computer programs which translate them into a single so-called weighted-average margin of dumping or subsidy, as the case may be. Despite the number of transactions recorded in these manipulations, the seeming efficacy of the end results, that is, the margins, is, upon inspection, found to be far removed from the pricing realities of the marketplace.

Without the oversimplification involved in the weighted-average pricing methods employed by Commerce and the Commission, these investigations could not have been undertaken and completed. Nor should they have been.

Now, to illustrate the problem with steel dealing with the misuse of remedy, I say additionally that, for years, U.S. steel producers have sought import quotas on shipments of foreign steel to lessen the competition from foreign producers of steel. Everyone who has had anything to do with it knows that was their ultimate objective, to have quotas. For more than 5 years now, the U.S. Government has engaged in feverish activity on behalf of U.S. steel producers. As a planned prelude to, and justification for, the imposition of import quotas, this activity took the form of all-out efforts to vest steel imports with the coloration and persuasion of being unfair under the antidumping and countervailing duty laws. These efforts did not succeed. Nevertheless, after the enactment of a special bill in late August 1982, the U.S. producers withdrew their petitions, as planned and specially provided for in title VII of the Tariff Act. Thereafter, quotas on imports of carbon steel became a reality.

In the meantime, the disposition of an escape-clause investigation and an antidumping investigation instituted by the Commission and Commerce at the request of the President under section 301 of the Trade Act of 1974 is still pending with respect to imports of specialty steel. There I refer to my statement of May 4 at page 29 in which I treat with this matter in this fashion.

With respect to petitions filed by the Tool and Stainless Steel Industry Committee and the United Steelworkers of America, the President in invoking section 301 of the Trade Act of 1974 determined that it was an appropriate and feasible response to subsidy practices of the European Community, Belgium, France, Italy, United Kingdom, Austria, and Sweden to supplement the countervailing duty investigations already in progress with a request to the Commission that it conduct an expedited investigation under section 201 of the trade Act of 1974, with respect to the specialty steel products subject to the section 301 proceedings. In justification of this action the President concluded that the petitions were factually and conceptually meritorious in this regard. He concluded, "if we are ever to put an end to constant trade disputes in steel, we must stop dealing with discrete import and export issues in isolation and instead begin a coordinated approach to the problem. By combining the section 201 and section 301 approaches, the United States hopes to stabilize the immediate import situation and to reverse the global trend toward greater excess capacity, increased subsidization, and closed markets."

In my opinion the action of the President utilizing the section 201 escape-clause investigation in conjunction with countervailing-duty proceedings is wholly unwarranted, and admixing an unfair trade law with a law that presumes the trade is fair is not justified. It is like trying to mix oil and water. Nor is it proper in my view that the President should pass judgment on the facts at the outset of the investigation. However, since the President has already passed on the facts and concluded that import relief is the appropriate solution, it would appear that he should examine his extraordinary powers under the national security and emergency laws.

When section 301 departed from just taking a look at our exports, and became superimposed on the framework of U.S. import remedies, it now just further confuses the options available to U.S. industries in particular circumstances.

[The prepared statement follows:]

STATEMENT OF RUSSELL N. SHEWMAKER

INTRODUCTION

Thank you for this opportunity to appear before the Subcommittee on Trade and to offer comments on and suggestions for the improvement of the Nation's trade remedy laws and their administration.

In the Subcommittee's notice of February 15, 1983, it is stated that the Subcommittee is particularly interested in determining how the expense and time involved in processing cases under current procedures might be reduced in order to ensure U.S. industry and labor, including small business, access to trade remedies.

At the outset, I wish to explain that I am speaking for myself. Prior to my retirement from the U.S. International Trade Commission in January 1981, I had had almost half a century of Government service in positions dealing with the U.S. foreign trade laws and their administration.* On the strength of this background and experience, I am pleased to offer my comments and suggestions to the Subcommittee.

In this statement, comments and suggestions are made not only on the specific trade remedy laws listed in the Subcommittee's notice but, also, on certain other related provisions of law that, in larger context, would seem to be germane to the Subcommittee's inquiry and review.

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* Prior to my retirement from the Commission, I had served as Attorney-Advisor for 5 years, Assistant General Counsel for 8 years, General Counsel for 14 years, and Senior Advisor for over 2 years. Previously I had served in the Bureau of Customs for 16 years, including 10 years as a Legal Assistant in the Tariff Classification Section. I graduated from the George Washington University, AB '42 and JD '41 and have been a member of the D.C. Bar since 1941.

The seeds or beginnings of the current trade problems can be identified in the divergences of U.S. foreign trade policy in recent years which culminated in the enactment of two omnibus measures, viz, the Trade Act of 1974 and the Trade Agreements Act of 1979. The Trade Act of 1974 delegated to the President a series of far-reaching, negotiating and rate-changing authorities, and, in section 151 thereof, introduced the so-called "fast-track" Congressional procedures for the legislative implementation of non-tariff barrier agreements concluded by the President. The Trade Agreements Act of 1979 is a comprehensive, fast-track implementation of numerous Presidential actions taken mostly under the 1974 Trade Act.

The problems involved are formidable and fundamental. They pervade the whole of the governmental structure devoted to the development and administration of the U.S. trade laws. The problems include the following:

a) substantive deficiencies and needless procedural complexity introduced in the provisions of the Trade Agreements Act of 1979 implementing the Tokyo Round of GATT trade negotiations;

b) failure of the foreign trade agencies to develop the requisite relevant, reliable, product-oriented pricing and other data for making informed, responsible decisions on the many trade matters that arise from day to day; and

c) the misuse of the U.S. trade remedy laws.

The problems described in a), b), and c), *supra*, are a consequence of many factors, including--(1) poor, ineffective leadership, (2) the absence of requisite technical and professional expertise, (3) manpower shortages, especially at U.S. ports of entry and exit, (4) poor coordination of inter- and intra-agency functions, and (5) flagging morale in trade agency staffs. Inevitably, these factors, taken together with the problems generated, have seriously undermined the credibility of U.S. trade decisions and the position of U.S. leadership in the world trading community.

The Subcommittee's review of these foreign trade matters comes none too soon. If its jurisdiction in such matters is diligently pursued and prudently exercised, a giant step will have been taken toward the restoration of the United States to its position of leadership among the nations of the world trading community.

Hereinafter, a number of suggestions are made, with explanations, which, if adopted, would go far toward correcting and improving the substance and administration of the U.S. foreign trade laws under review by the Subcommittee. As might be expected, however, it will be noted that not all of the suggestions relate directly to the need for legislative action by the Subcommittee. A number of the suggestions could be implemented, without any statutory change, by the President or the agency or agencies involved.

THE U.S. TRADE REMEDY LAWS

Your notice of February 15, 1983, states that the statutes to be reviewed by the Subcommittee include--

a) provisions for import relief in sections 201-203 of the Trade Act of 1974;

b) provisions for market disruption in section 406 of the 1974 Act;

c) the antidumping and countervailing duty laws, as amended by the Trade Agreements Act of 1979;

d) provisions pertaining to unfair import competition in section 337 of the Tariff Act of 1930; and

e) provisions for the enforcement of U.S. rights in international commerce in section 301 of the 1974 Trade Act.

The Committee also seeks suggestions on how the international dispute settlement processes might be made more efficient and effective.

In addition to the foregoing, the following trade relief statutes are considered hereinafter--

a) the provisions for so-called voluntary restraint agreements in section 204 of the Agricultural Act of 1956;

b) provisions for interference with U.S. agricultural programs in section 22 of the Agricultural Adjustment Act; and

c) provisions relating to national security and emergency powers of the President in section 232 of the Trade Expansion Act and in the National Emergencies Act of 1976 and the International Emergency Economic Powers Act of 1977.

Escape-Clause Investigations

The so-called escape-clause investigations are conducted by the U.S. International Trade Commission under the provisions of section 201-203 of the Trade Act of 1974 to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

The notice of the Subcommittee urges participants in the hearing to address a proposal that this import relief law be transformed into--

> . . . a truly effective adjustment statute which will promote modernization and productivity in industries chronically affected by import competition.

Implicit in this proposal is the conclusion that the current provisions in Title II of the Trade Act of 1974 are deficient, or, as administered, are less than effective, or both.

The 1974 Act, in section 201(a)(1), requires that the petition for import relief include--

> . . . a statement describing the specific purposes for which import relief is being sought, which may include such objectives as facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition.

Section 201(b)(5) requires that the Commission, for the purposes of assisting the President in making his determinations under sections 202 and 203, investigate and report on--

> . . . efforts made by firms and workers in the industry to compete more effectively with imports.

Related provisions in Chapters 2, 3 and 4 of title II of the Act provide for various types of adjustment assistance for workers, firms and communities injured by import competition. Chapter 2 is administered by the Secretary of Labor and Chapters 3 and 4 by the Secretary of Commerce.

In my opinion, the aforestated proposal is, at first blush, laudable in its purpose but, in reality, is more visionary than practical.

If, on the one hand, the principal problem is that the petitioners, the Commission, Labor, and Commerce are, individually and collectively, remiss in fulfilling their respective obligations under title II, correction would not require new legislation; it would be sufficient for the Committee to strongly address the problem in its report. If, on the other hand, the suggested transformation contemplates substantive changes in existing law, I am not sufficiently informed to know what they might be.

It is my belief, however, that the solution to the problem of industry adjustment to import competition founders due to its inconsistency with fundamental concepts governing our free markets. The adverse impact of imports on the domestic industry is often concentrated in firms that are poorly managed and that are even unable to compete effectively with their more efficient domestic competitors, including U.S. based multinationals. Under such circumstances, it would seem to be difficult, if not impossible, for the industry's firms and workers to collaborate closely in the development of a detailed, mutually satisfactory and truly effective adjustment plan. Additionally, it would seem neither feasible nor desirable for the Government to assume the responsibilities of management during the statutory period of adjustment.

The apparent ambivalence of the United States with respect to the escape-clause provisions of the GATT and other trade agreements rests on pragmatic, political considerations which were in evidence even at the outset of the trade agreements program in 1934. Concern regarding the possible injurious effect of tariff concessions on U.S. producers, however, led to the formulation of a formal safeguard or "escape clause." In 1943, such a clause was included for the first time in a trade agreement with Mexico.

On February 25, 1947, when the GATT was being formulated, the President issued Executive Order 9832 pursuant to his delegated authority under section 350 of the Tariff Act thereby formalizing and making mandatory certain trade-agreement procedures, including the incorporation of an escape clause in every trade agreement entered into thereafter. At this time, a statement of the President accompanying the Executive Order pointed to conversations regarding it between Under Secretaries of State Acheson and Clayton and Senators Vandenberg and Millikin and recognized that--

> . . . bipartisan support of our foreign economic policy as well as of our foreign policy in general, is essential.

The purpose and practical effect of this political activity was to assure the continuity of the trade agreements program in the postwar period by the passage of extension acts without lapse.

The escape clause of the GATT, i.e., Article XIX, and indeed the GATT as a whole, presume that the imports involved are being *fairly traded.* Article XIX is not designed, nor does it presume, to deal with the consequences produced by *unfair trade.* Article XIX is a planned but limited continuation of *protectionist trade policy* and, as such, inherently a political "hot potato."

Thus, if a concession is temporarily suspended or modified by invoking the escape clause, the contracting party invoking it is expected to "compensate" the other contracting parties. Compensation may take the form of new concessions granted by the contracting party which took the escape action, or the suspension or modification of concessions it has received. In contrast, it is important to observe that *compensation is not required for import actions taken to prevent or remedy unfair trade.*

In the 1951 Trade Agreement Extension Act, the Congress substituted statutory procedures for invoking the escape clause. Thereafter, the Congress legislated a number of times, sometimes tightening and sometimes relaxing, the requirements for industry relief.

Thus, any affirmative escape-clause injury determination of the Commission which is coupled with a recommendation that the President impose increased import restrictions on the products involved invariably poses a dilemma for the President and the Congress. The *highly political nature* of the issue and its *potential trade agreement consequences* leave no clear choice. The political atmosphere becomes charged with dialogue, rhetoric, "hip-shooting," misconceptions, and more. The increased imports involved are intolerable and unfair, say the supporters of U.S. industry. On the other hand, the "purists" proclaim the consumer benefits and other virtues of unrestricted import trade and decry any measure that would inhibit it and do violence to the historic MFN or other trade policy of the United States. The statutes and trade agreements of the United States have committed us in both directions. The "resolution" of the dilemma requires an *even-handed but pragmatic balancing of political and conceptual considerations.*

In the 1950s, it was the practice of the President, when he rejected import relief recommended by the Commission, to "shoot-down" its economic analyses and conclusions. If he did otherwise, he would be clearly in the position of denying relief to a seriously injured U.S. industry. This led to considerable controversy and a hue and cry for legislation to make Commission determinations final. This clamor for legislation was successfully and properly resisted. It is manifestly improper for the Commission to be the final arbiter of trade policy matters of this nature. Under the current statute, the President is authorized to accept or deny the Commission's affirmative determinations on the grounds of their being, or not being, in the national economic interest. This permits the President to avoid taking public issue with the substance of the Commission's affirmative determinations.

Suggestions: In view of the foregoing, it is suggested that--

1) Because of the political nature of and controversy that surrounds escape-clause actions, it behooves any Administration and the Congress--whether accepting or rejecting Commission affirmative determinations--to explain its actions in clear, informed, balanced statements.

2) See "Misuse, etc.," page 32.

Market Disruption

Under section 406 of the Trade Act of 1974, the Commission investigates to determine, with respect to imports of an article which is the product of a communist country, whether market disruption exists with respect to an article produced by a domestic industry. Market disruption exists within a domestic industry whenever the imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to the domestic industry.

Section 406 is in the nature of a companion provision to sections 201-203 of the Act. It borrows most of the procedures set forth therein.

Suggestions: It is suggested that--

3) section 406 should be amended so as to become the basic import relief proclaimed by the President to offset market disruption occasioned by imports the product of a nonmarket economy country; and

4) see suggestion No. 13 on page 20.

Voluntary Restraint Agreements

Section 204 of the Agricultural Act of 1956 authorizes the President to negotiate agreements with foreign governments to limit the export from such countries and the importation into the United States of *any agricultural commodity or product manufactured therefrom or textiles or textile products.*

There are currently in effect numerous bilateral agreements negotiated and made effective under authority of section 204 with respect to textiles and textile products. However, world conditions have been such with respect to certain meat products that restraints previously imposed thereon under section 204 have not been in effect since December 31, 1982.

With respect to textiles and textile products, the President, acting under authority of section 204 and the Multifiber Arrangement (MFA), has negotiated a series of bilateral agreements which govern their U.S. import trade with the participating countries. The U.S. import program which has been in operation for about a quarter of a century is designed to prevent imports of textiles and textile products from causing market disruption in the United States. The program is highly complex, unsystematic and rarely understood. By action taken in October 1981 by the contracting parties, the MFA has been extended for a further period of five years from December 31, 1981, to December 31, 1986.

The program is supported by an international bureaucracy under the aegis of the GATT and a national bureaucracy of some proportions centered in the Department of Commerce and aided by a number of other U.S. trade agencies. At the present time, virtually all imports of cotton, wool, and manmade fibers are subject to its provisions.

Alone among the tariff nomenclatures of the world, the TSUS, by and large, distinguishes between textile products on the basis of the component fiber of chief value; the other countries employ the more objective chief-weight criteria. Moreover, the product categories of the TSUS for textiles and textile products are dissimilar to and in large measure incompatible with the product categories on the basis of which the various bilateral agreements are negotiated and carried out.

A further complication arises from the fact that, for the most part, the restraints are controlled (?) at the foreign port of exportation of the producing country. As a consequence, confusion, corruption and import overruns are inevitable and rampant.

The U.S. textile program is chaotic, inefficient, and needlessly expensive. It is lacking in substantive and procedural due process. It has the marked tendency to skew or divert the trade flows of textiles and textile products. For example, the complexity of the program and the problems generated can be profitably coped with and overcome only by large trading firms such as department-store chains. The risks are virtually insurmountable for small trading firms. In addition, since the export restraints are controlled on the basis of quantity (e.g., pairs, dozens, pounds, etc.), the trade tends to go to relatively high-value imports with the result that the cheaper goods are rarely imported. This latter problem is particularly visible from the absence in U.S. markets of imports of children's clothing.

In view of the foregoing, it is suggested that, for the purposes of the U.S. textiles import program, the Congress and the President take the necessary measures to--

5) transfer from the Department of Commerce, a partisan, advocacy agency, to the U.S. International Trade Commission, an independent, nonpartisan agency, the authority to make determinations of market disruption;

6) establish the quota periods for U.S. imports on the basis of the date of importation rather than the date of exportation from the country involved; and

7) substitute the chief weight method of classifying U.S. imports of textiles for the chief value method.

UNFAIR COMPETITION LAWS

Dumped and Subsidized Imports

The present and past provisions of law applicable to dumped and subsidized U.S. imports are the Antidumping Act, 1921, section 303 of the Tariff Act regarding countervailing duties, and title VII of the Tariff Act. The provisions of title VII of the Tariff Act were enacted in title I of the Trade Agreements Act of 1979. These latter provisions, effective January 1, 1980, superseded the Antidumping Act, but did not repeal section 303--the countervailing duty law--since it continues to apply to subsidized U.S. imports originating in countries which have not complied with the requirements of section 2 of the 1979 Act.

The responsibility for the administration of the provisions of title VII, and of section 303, where it applies with respect to imports of articles free of regular duties, is shared between the administering authority (the Secretary of Commerce) and the Commission. Prior to January 1, 1980, the administering authority was the Secretary of the Treasury.

In addition to making provision for the transfer of function to Commerce, the 1979 Act included other changes in the antidumping and countervailing duty laws. Among the changes are--

a) the addition of an import-injury test to the subsidy law in conformity with the related GATT agreement;

b) a provision authorizing release of price and cost-of-production information under protective orders;

c) complex provisions imposing strict deadlines for the performance of agency actions; and

d) elaborate provisions for judicial review throughout the course of agency proceedings.

As a result of these changes, the agency functions have taken on the status of quasi-adjudicative proceedings with elaborate rules and record-keeping procedures.

These changes in law are accompanied by the following--

a) the continuation of dual-agency administration of the dumping and countervailing duty laws;

b) the retention of the provision requiring the conduct of preliminary investigations and making them apply to every investigation;

c) the failure of the subsidy agreement and the 1979 Act to define the pricing concepts for calculating "margins of subsidy; and

d) the retention of provisions for applying the dumping and countervailing duty laws to U.S. imports from nonmarket economy countries.

Basically, for all the differences there are between the past and the present antidumping and countervailing duty laws, the substantive structure of both laws is now patterned on the structure of the Antidumping Act, 1921. The administering authority (Commerce) is responsible for determining whether dumping or subsidization exists and, if so, to provide the relevant pricing details to the Commission. The Commission then determines whether, by reason of the dumped or subsidized imports, the requisite injury to a U.S. industry is present or is threatened. An affirmative determination of the Commission requires Commerce to issue an order to U.S. ports of entry pursuant to which duties are levied, when appropriate, to offset the differences between the unfair and the fair prices involved.

Thus, the antidumping law and the countervailing duty law, as amended by the addition of the import-injury test, are both directed against unfair or discriminatory pricing in the U.S. import trade. As such, each law provides identical factors for the Commission's consideration in making its import-injury determinations. However, each law also should be founded upon similar pricing concepts. In this regard, the antidumping law is governed by pricing concepts of long standing currently reflected in sections 772 (United States price) and 773 (foreign market value) of the Tariff Act. On the other hand, no pricing concepts for the countervailing duty law were negotiated in the GATT subsidy code nor were they enacted in the 1979 Act.

The absence of provisions for determining the "margins of subsidy" is unfortunate. In this regard, Commerce continues to express these margins in terms previously used by Treasury when the import-injury test was not a part of the law. Terms such as "foreign" or "export" value or price, and prices "f.o.b. foreign port of exportation," are being used without definition and sometimes the notification to the Commission from Commerce shows no indication of what the margins are or how they are to be determined.

Additionally, with respect to the matter of pricing, neither the past nor the present laws have given the pricing concepts that the Commission is to apply in gathering and analyzing the relevant prices of domestic articles that are comparable to the dumped or subsidized U.S. imports. Discretion and common sense, however, dictate that such concepts must be compatible with the pricing concepts applied under the law to U.S. imports.

In the years when the Secretary of the Treasury and the Commission jointly administered the Antidumping Act, they established procedures under which the Treasury, upon making an affirmative determination with respect to less-than-fair-value (LTFV) sales, promptly furnished to the Commission the Treasury file for that case, including the worksheets for the six-month or other appropriate "sample" period investigated by Treasury. The worksheets provided a complete pricing chronology that identified in the U.S. marketplace, and gave the specific pricing and other details for, each U.S. import transaction examined by Treasury for the sample period. The Commission, armed with this essential pricing information, was able to plan its import-injury investigation so as to identify in the U.S. marketplace the actual or potential contemporaneous transactions involving the specific comparable domestic products that were being adversely affected by the dumped imports.

The obvious benefits derived by the Commission from its utilization of the Treasury file in each case came to an end in the wake of an ill-advised, devastating reorganization of the Commission's professional staff in the mid-1970s. The Commission's action caused a rash of resignations and transfers of competent, knowledgeable professionals, one of the immediate consequences of which was the loss of pricing expertise at the top staff level. Investigators confronted by the presence of the Treasury file were not instructed as to its use. The Treasury files, therefore, were locked in file drawers for the duration of the Commission's investigation, after which they were returned to Treasury.

With the transfer of the Treasury function to Commerce, effective January 1, 1980, the Commission no longer receives and almost never asks for the Commerce file. Moreover, even if the Commission were to receive the file, the pricing data provided therein are not useful for making the critical price comparisons that the Commission must make for the purposes of its import-injury determinations. Since Commerce, not the Commission, is required under the law to determine whether U.S. imports are being dumped or subsidized, the Commission's practice of using import pricing data it has gathered for the purposes of its preliminary and final determinations is not legally defensible.

As matters presently stand, both the Commission and Commerce utilize weighted-average prices for heterogeneous classes of articles. These so-called prices wholly obscure any true pricing profiles of discreet product entities that may have crept into the computations for the product-mix. Indeed, the Commerce notification to the Commission of an affirmative dumping or subsidy determination provides an overall, weighted-average margin that has no probative usefulness whatsoever for the purposes of the Commission's import-injury determination.

The questionnaires and reports issued by the Commission in cases involving allegations of unfair or discriminatory pricing of U.S. imports utilize the same set of economic indicators as are used by the Commission in its escape-clause determinations. These indicators include, among others, "increased quantities" of imports and weighted-average prices on a quarterly basis for a five-year period. In this regard, the *sina qua non* for relief under the escape clause is increased imports, whereas, for relief under title VII of the Tariff Act, it is the unfair or discriminatory pricing of imports.

Thus, in cases instituted under title VII, the combined practices of Commerce and the Commission, in practical effect, conspire to (1) negate any possibility of their having useful pricing data that meets the criteria for import-injury determinations under title VII and (2) effectively substitute therefor the escape-clause standard of increased imports, but with the less-demanding "material injury" test of title VII applying instead of the more stringent "serious injury" requirements of sections 201-203 of the 1974 Trade Act.

The net effect of the Commerce-Commission practices is to purvey and lend spurious coloration to their determinations, whether they are affirmative or negative. In fact, the determinations do not satisfy the requirements of either the escape clause or title VII of the Tariff Act. Yet, on their face, they purport to satisfy the requirements of title VII. Affirmative determinations, so postured, provide import remedies that avoid the GATT requirement of compensation. They also serve to cast doubt on the credibility of the United States with its trade-agreement partners and in the world trading community.

The Subcommittee asks for comments on certain proposals already before it for improving the administration of antidumping and countervailing duty laws to make them "less complex, costly, and time consuming for all parties." Examples of such proposals are: (a) modifying of preliminary determinations, (b) simplification of calculation procedures, and (c) curtailment of interlocutory judicial review. The notice also asked for comments on proposals for modifying existing laws to deal more effectively with price competition from nonmarket economy countries, including the creation of a new "artificial pricing" test more realistic than the test applied under existing antidumping law such as S. 958, 97th Congress. These proposals will be commented upon hereinafter in making my own suggestions for improvement of these laws.

It is suggested that the conceptual and procedural snarls presently arising under the dumping and countervailing duty laws and the inordinate costs to litigants thereunder can be substantially reduced or eliminated if the laws are amended so as to--

8) transfer from the Department of Commerce, a partisan, advocacy agency, to the U.S. International Trade Commission, an independent, nonpartisan agency, the authority to make the determinations of dumping and subsidization;

9) provide a statutory base for the administering authority to make determinations for the "margins of subsidization";

10) repeal the provisions for preliminary investigations;

11) repeal the provisions authorizing interlocutory judicial review;

12) repeal the provisions authorizing the the issuance of protective orders;

13) repeal the provisions applicable to nonmarket economy countries;

14) substitute the term "comparable product" for the term "like product"; and

15) conform repeals of provisions such as those authorizing quotas for subsidized imports and numerous subordinate determinations.

1) Transfer of Commerce Function to Commission.--Most of the problems associated with these laws are inherent in the provisions therein for their dual administration. One-agency administration is a necessity.

2) Margins of Subsidization.--See page 16 for a discussion of this problem.

3) Eliminate Preliminary Investigations.--These provisions have their origins in complaints of the EEC and other GATT contracting parties that, to lessen the time required for each case, the two agencies should be acting simultaneously. Later, the saving of administrative expense was also used as a justification for the enactment of the provisions for preliminary investigations. Neither of these justifications is credible. In any event, such matters can be taken care of in each case by a proper determination with respect to the sufficiency of import relief petitions as the basis for commencing investigations under section 702 or 732 of the 1979 Act.

4) Eliminate Interlocutory Judicial Review.--It should be obvious that the tight time-frame for administrative determinations under these laws does not permit frequent appeals to the court for interlocutory relief. See Judicial Review, p.42, supra.

5) Eliminate Protective Orders.--The provisions in section 777(c) of the Tariff Act authorizing the agencies to release pricing and cost-of-production information under protective orders are not only controversial and difficult to administer, they also invite the legitimate concern of those firms, domestic and foreign, whose data are in issue. The agency proceedings should be divested of their quasi-adjudicative trappings, and be restored to their

administrative status where only the integrity of the agency itself and the criminal provisions of 18 U.S.C. 1905 are involved in the protection of confidential business data.

6) Eliminate Provisions Applicable to Nonmarket Economy Countries.--The antidumping and countervailing duty laws should not apply to U.S. imports for nonmarket economy countries. In view of the incompatibility of U.S. valuation and pricing concepts with the trading practices of such countries, the proceedings with respect to such imports have been unduly complex as well as farcical and wholly unrealistic. The principal past experiences have been with communist countries which have tended to stir up ideological undertones, if not controversies. Also, since quantitative import restrictions are, in general, the only suitable ones for dealing with such imports, and as petitions regard them tend to provoke political controversy, import relief would be more appropriately left in the domains of the President and the Congress under section 406 of the Trade Act of 1974. See page 10, supra.

7) Substitute "comparable product" for "like product.--In section 771(10) of the Tariff Act, the term "like product" is defined to mean "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title." It is extremely confusing to have a term defined so that it has two meanings in the same statute, viz, "like" means both "like" and "similar" and "like" but not "similar." It is not evident in the Commission reports, at times, in which context the term "like" is used.

Unfair Import Practices

The provisions of section 337 of the Tariff Act confer upon the Commission jurisdiction with respect to unfair practices in the U.S. import trade. Section 341 of the 1974 Trade Act amended section 337 to give to its provisions adjudicative status subject to the Administrative Procedures Act. Such provisions had previously had an advisory-recommendatory status, with the President having final authority to act. In the Commission, the Unfair Import Investigations Division (UIID) and the Nonadjudicative Division in the Office of Investigations are indivisibly fused under the supervision of the Director of Investigations.

In view of the fact that section 337 potentially applies to unfair pricing practices in the import trade which are within the purview of the antidumping and countervailing duty laws, subsection (b)(3) of section 337 gives priority jurisdiction to the latter laws which are under the joint administration of the Commission and Commerce. This dual jurisdiction has been the occasion of conflict ("turf fighting") between the administering agencies.

Subsection (e) of section 337 confers upon the Commission authority to exclude articles from free entry temporarily during the course of its investigation, except under bond. The need for this authority no longer exists inasmuch as strict time limits have been placed on the completion of the full investigation. Also, the Commission has adopted a practice of granting expeditious treatment to investigations in appropriate cases.

Suggestions: In view of the foregoing, it is suggested that--

16) the administration of the adjudicative and nonadjudicative functions now centered in the Director of Investigations of the Commission should be separated by administrative action and appropriate public notice;

17) subsection (b)(3) of section 337 should be repealed. (This suggestion assumes the acceptance of the suggestion made herein on page 20 that the Commission be given total authority to administer title VII of the Tariff Act); and

18) subsection (e) of section 337 should be repealed.

Import Interference with Agricultural Programs

Under the provisions of section 22 of the Agricultural Adjustment Act, whenever the Secretary of Agriculture has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken by the Department of Agriculture, he so advises the President; and, if the President agrees that there is reason for such belief, the President causes an immediate investigation to be made by the Commission. The Commission reports the results of its investigation to the President, and he is, within prescribed limits, authorized to proclaim such import fees (special duties) or quantitative limitations on such imports as he finds to be needed on the basis of the report.

Under the second paragraph of subsection (b) of section 22, the President is authorized to take immediate action on a proposal of the Secretary without awaiting the recommendations of the Commission whenever the Secretary determines and reports to him that a condition exists requiring emergency treatment. The emergency action of the President continues in effect pending the report of the Commission and action thereon by the President.

There is also provision for Commission reports to be made to the President following review of outstanding import fees or quotas to see if changed circumstances require that the proclamation imposing them be modified, suspended, or terminated.

The role of the Commission in these investigations is to serve as a check and balance on proposals of the advocate agency, i.e., the Department of Agriculture, to the President that he proclaim import restrictions of U.S. imports of agricultural products which are believed to be materially interfering with any program or operation of the Department.

In recent years, several problems have arisen in connection with the administration of section 22. The President, in Proclamation 4631 of December 28, 1978, vested in the Secretary authority to make quarterly and other adjustments in the special duties imposed under section 22 on imports of sugar. In fact, this redelegation to the Secretary had been executed by subordinate officials of the Department. This proclamation not only removed the periodic duty changes on sugar from the oversight of the President and the Secretary, but also, for all practical purposes eliminated the investigative functions of the Commission that are required by section 22.

A further deviation from the normal practice under this section occurred with the issuance of Proclamation 4807 of December 4, 1980, by Reubin O'D. Askew, the U.S.Trade Representative, temporarily enlarging the section 22 import quotas on peanuts. The proclamation was issued by the Trade Representative, on behalf of the President, under authority delegated to him by the President with respect to peanuts only in a memorandum of December 3, 1980. The delegation expired January 20, 1981. In view of the fact that the peanut interests of the President were being held in trust and the fact that the action enlarging the import quota on peanuts presented neither a conflict of interest nor the appearance of conflict, it would appear that no exigency or unusual circumstances existed that would have justified the redelegation action taken by the President.

Additionally, this proclamation on peanuts was issued under authority delegated to the President under section 22(b). This "emergency" action is a further example of excessive use of the emergency authority, when the use thereof might have been averted by prompt and effective coordination between Agriculture and the Commission. The overuse of the emergency authority shortcuts the full investigative procedures envisaged by section 22 and gives the proceedings of the Commission a sham appearance.

Suggestion: In view of the foregoing, it is suggested that--

19) The President and the Secretary of Agriculture should examine the mismanagement of this import authority and restore the proper procedures for its use.

National Security and Emergency Powers

The President is vested with broad powers to regulate trade and commerce under several statutory provisions: Section 232 of the Trade Expansion Act, section 5(b) of the Trading with the Enemy Act of 1917, section 122 of the Trade Act of 1974, the National Emergencies Act of 1976, the International Emergency Economic Powers Act of 1977, and section 338 of the Tariff Act.

Section 232 of the TEA authorizes the President, under prescribed procedures, to adjust the imports of an article and its derivatives so that such imports will not threaten to impair the national security. This authority is flexible in that it can be used to relax or tighten existing import restrictions or to impose new restrictions. Under this authority, and its predecessor provisions, the President established the Mandatory Oil Import Program in 1959. The imports of oil and derivatives thereof that were subject to this program are the only imports for which the statutory authority has been invoked by the President. The Secretary of Commerce is currently charged with responsibility for making the investigations prerequisite to the use of this authority.

Under section 5(b) of the Trading with the Enemy Act, the President can control U.S. imports during the time of war. This provision was amended in 1933 to enlarge the President's power so that it applied not only during the time of war but also during "any other period of national emergency declared by the

President." This 1933 enlargement of section 5(b) was repealed and was reestablished in the International Emergency Economic Powers Act of 1977. Thus, the President's statutory power to control imports during periods of national emergency other than war is now covered by the 1977 enactment rather than by section 5(b). This authority is subject to procedural requirements set forth in the National Emergencies Act of 1976. Section 5(b), as enlarged in 1933, was the legal basis for Proclamation 4047 of August 13, 1971, which imposed a supplemental duty for balance-of-payments purposes on almost all dutiable U.S. imports. The President now has specific balance-of-payments authority to change import duties under section 122 of the Trade Act of 1974.

Under section 318 of the Tariff Act, the President, whenever he proclaims that an emergency exists by reason of a state of war, or otherwise, may authorize the Secretary of the Treasury to extend during the continuance of such emergency the time prescribed by the Tariff Act for the performance of any act. The President may also authorize the Secretary to permit the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work.

Suggestions: Suggestions with respect to the utilization of these laws are made hereinafter at page 34.

Enforcement of United States Trade Agreement Rights

Section 301 of the Trade Act of 1974 is wholly restructured by section 901 of the Trade Agreements Act of 1979. As originally enacted in section 252 of the Trade Expansion Act, the provisions gave to the President authority to take U.S. import action in response to any act, policy, or practice of a country that is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce. Section 301, as amended by the 1979 Act also authorizes the Presidant to enforce the rights of the United States under any trade agreement. The President, acting pursuant to this latter authority in section 301, has taken a number of actions looking toward the imposition of U.S. import restrictions on foreign goods. One of the recent Presidential actions is directed against imports of specialty steel products.

With respect to petitions filed by the Tool and Stainless Steel Industry Committee and the United Steel Workers of America, the President, invoking section 301(a)(2) of the Trade Act of 1974, determined that it was an appropriate and feasible response to subsidy practices of the EC, Belgium, France, Italy, the UK, Austria, and Sweden to supplement the countervailing duty investigations already in progress with a request to the Commission that it conduct an expedited investigation under section 201 of the Trade Act with respect to the specialty steel products subject to the section 301 proceedings. In justification of this action, the President concluded that the petitions were factually and conceptually meritorious in this regard. He concluded, as follows:

> . . . If we are ever to put an end to constant trade disputes in steel, we must stop dealing with discrete import and export issues in isolation and instead begin a coordinated approach to the problem. By combining the section 201 and section 301 approaches the United States hopes to stabilize the immediate import situation and to reverse the global trend toward greater excess capacity, increased subsidization, and closed markets.

In my opinion, the action of the President utilizing a section 201 investigation in conjunction with a countervailing duty proceeding is wholly unwarranted. Admixing an unfair trade law with a law that assumes the trade is fair is not justified. Nor is it proper, in my view, that the President should pass judgement on the facts at the outset of the investigations.

However, since the President has already passed on the facts and concluded that import relief is the appropriate solution to this global problem, it would appear that he should examine into his extraordinary powers under the national security and emergency laws. See "Misuse of Trade Remedy Laws" at pages 32-34.

ADMINISTRATION

The Federal administrative structure for these laws consists of the U.S. International Trade Commission, a key, independent, nonpolicymaking agency, and the U.S. Trade Representative, the Departments of State, Treasury, Commerce, Labor, and Agriculture, and other policymaking foreign trade agencies of the Executive Branch.

The Subcommittee is confronted with many problems in its consideration of options to improve the substance and administration of the U.S. trade remedy laws. In short, the basic problem is that the credibility of U.S. foreign trade decisions and reports is being undermined seriously by critical deficiencies in the reliability, relevance and completeness of the data being utilized to support them. The trade data deficiences stem primarily from the inadequacies of the efforts made by the Commission and the Departments of Commerce and Treasury to collect the needed data.

Current indications are that conditions will continue to worsen unless drastic corrective measures are undertaken and carried out promptly. It follows, then, that high priority should be given to the development of measures to establish institutional credibility.

The foreign trade agencies are operating inefficiently and wastefully. In keeping with good government and the announced policies of the Administration, appropriate actions should be taken to eliminate inefficiency and waste. At the same time, care must be exercised to insure that these essential agencies become effective and efficient in carrying out their assigned trade functions. This calls for a realistic appraisal of their manpower needs.

A compelling need exists for actions to be taken by the administering agencies, individually and collectively, to gain strength by developing effective recruitment programs, especially for their professional staffs. Adequate training outside Government is not available for such professionals with regard to the legal parlance of the customs and unfair practices statutes of the United States.

For example, the administration and coordination of the agency and related inter-agency functions of the Commission, the Customs Service and Commerce with respect to trade statistics, the Tariff Schedules of the United States, customs valuation, and other customs laws and procedures can be facilitated by the establishment of a new continuing inter-agency unit as an adjunct to the existing inter-agency statistical committee established under section 484(e) of the Tariff Act. The new unit could be manned by competent attorneys and technicians from each agency for the purpose of preparing training materials and having classroom instruction for the professional staffs of the agencies.

Suggestion: It is suggested that--

20) A viable program should be initiated looking toward the maintenance at all times of competent career staffs of professionals and specialists in the trade agencies.

Misuse of Trade Remedy Laws

In the earlier pages of this paper, examples of agency misuse of the trade remedy laws have been recited. Such is the case with respect to the voluntary restraints imposed of imports of textiles under section 204 of the Agricultural Act of 1956 and the Multifiber Arrangement, title VII of the Tariff Act, section 22 of the Agricultural Adjustment Act, and section 301 of the Trade Act of 1974. Two examples of the most flagrant misuse occurred in connection with petitions filed under the escape-clause provisions with respect to automobiles and under title VII of the Tariff Act with respect to carbon steel products.

In April of 1980, the Department of Commerce, acting under authority of section 732 of the Tariff Act, commenced dumping investigations with respect to imports of carbon steel from certain EC countries. Several months later, in June of 1980, the Commission instituted an investigation under section 201(b) of the Trade Act of 1974 with respect to imports of automobile trucks and passenger automobiles. Thus, in response to petitions for import relief, separate proceedings were begun under the dumping provisions with respect to carbon steel and under the escape-clause procedures with respect to motor vehicles. Despite the dissimilarities of the two proceedings, they had an important element in common--neither investigation should have been instituted.

The dumping provisions, the subsidy provisions (with the addition of the injury requirement), and the escape-clause provisions are alike in that they are designed to apply to discrete classes in localized market situations. It was never contemplated that these provisions for import relief would have applicability to, or provide solutions for, nationwide or worldwide symptoms of economic distress such as have existed in the past few years. In popular terms, it has been said correctly that these relief provisions are akin to shooting at a target with a rifle as opposed to using a shotgun.

The petitions on carbon steel covered almost all steel mill products (even though many tubular products were not included). Thus, there were literally hundreds of discrete product classes of carbon steel involved. Likewise, the proceedings on motor vehicles (had they been properly carried out by the Commission) should have involved consideration of the production and sourcing of a vast number of automotive components, not just the quantities of finished units imported and domestically produced. In other words, the two proceedings involved product coverages of such magnitude that due and proper consideration was not possible in the statutory time frame of the provisions involved.

In addition, and even more compelling, is the fact that the critical nature of the products involved--their basic status and pervasiveness in the U.S. and world economies--does not fit within the rigid confinements of the dumping and escape-clause provisions. For example, with respect to motor vehicles, if import restrictions were imposed by the President by invoking the escape clause of Article XIX of the GATT, how could the United States compensate the adversely affected contracting parties? The cost would be astronomically high and unwarranted.

In the late 1950s, the Commission advised the Congress that a proposed Senate resolution requesting an escape-clause investigation with respect to all textiles and textile products was the equivalent of many hundreds of escape-clause investigations of individual products, and that a single investigation of that magnitude was not feasible within the time and under the conditions prescribed by statute. No further action on the matter was taken by the Congress.

In sum, the interrelationship of the steel and automotive problems and the oil problem suggests that, if import restrictions were to be further considered or imposed, the matter should have been left to the judgment and discretion of the President under his special delegated powers with respect to national security or international emergencies.

Suggestion: In the circumstances recited above, it is suggested that--

21) more attention should be given by the Commission and Commerce to the product scope of petitions filed under sections 201-203 of the Trade Act of 1974 and title VII of the Tariff Act; and

22) U.S. trade officials should familiarize themselves with respect to the complementary relationship of the national security and emergency laws to the escape-clause, antidumping, and countervailing duty laws when import relief measures are determined to be needed.

Misuse of Related Laws

Under the Constitution and Statutes of the United States, the Congress and the President are responsible for the formulation and the carrying out of U.S. foreign trade policy. Since 1963, U.S. foreign trade policy has been substantially reflected in the provisions of the TSUS and related statutes and proclamations.

An examination of the TSUS reveals that U.S. foreign trade policy is a composite or mixed mass of Congressional and Executive actions that are not wholly coherent or consistent. Unconditional MFN--the historic keystone of U.S. foreign trade policy--often gives way to the application of preferential or discriminatory customs treatment of U.S. imports from particular sources. And, sometimes, official free-trade pronouncements are subsumed by protectionist fiat.

To say the least, the collective actions and decisions of the Congress and the President that constitute U.S. foreign trade policy should be generally worthy of acceptance and respect as having been formulated upon the consideration of reliable, relevant and reasonably complete data with respect to U.S. imports, exports and consumption. In this regard, there is grave cause for concern. Moreover, current indications are that conditions will continue to worsen unless drastic corrective measures are carried out.

The blame for the chronic shortcomings of official foreign trade data is pervasive. It lies not only with the federal agencies primarily responsible for the collection and publication of such data, namely, the Commission, Commerce and Treasury; it lies also with the Congress and the President.

The collection of U.S. foreign trade statistics is provided for in several provisions of law, including section 484(e) of the Tariff Act. As first enacted, this section applied only to U.S. imports. It directed the Commission, Commerce and Treasury to establish for statistical purposes an enumeration comprehending all articles imported into the United States. Since the adoption of the TSUS in 1963, an annotated version thereof has been published for collecting import statistics. In this publication, each legal class is identified by a distinctive 5-digit number. Additional statistical detail is provided by subdivision of the legal classes into two or more subordinate classes each of which is identified by the addition to the 5-digit numbers of 2-digit suffixes.

U.S. export data are tallied by Commerce from export declarations filed with Customs at U.S. ports of exportation, as required by Schedule B, a document published by Commerce. Customs is not required to review or verify the declarations. Data on domestic production are collected by Commerce's Bureau of the Census, in accordance with the Standard Industrial Classification (SIC).

New statistical authority regarding U.S. exports and production was granted to the three agencies by section 608(a) of the 1974 Trade Act. It amended section 484(e) to direct them to establish a statistical enumeration comprehending all articles imported into and exported from the United States, and to seek, in conjunction with statistical programs for domestic production, to establish the comparability thereof with such enumeration of articles.

Crucial to the development of comparable U.S. trade statistics is a viable TSUSA. Of the three statistical programs, the TSUSA only is derived directly from statutory product classes. Indeed, the SIC is not even designed as a product code. Thus, if comparability is to be achieved short of legislation, the provisions of Schedule B and the SIC perforce must be made compatible with the legal classes of the TSUSA.

Little or nothing has been accomplished by the three agencies under the mandate of section 484(e) to achieve the reliability, comparability or administerability of the U.S. statistical trade programs.

A viable TSUSA is also a key or pivotal factor in the formulation of an international product nomenclature that reflects fully the interests of the United States. Unfortunately, the integrity of the TSUS product classes has been severely compromised in recent years, primarily as a consequence of proclamations and executive orders issued by the President under delegated authorities of the Trade Act of 1974 and the Trade Agreements Act of 1979. Derivatively, this has also produced a deterioration in the statistical yield and the administerability of the TSUSA.

For example, the implementation of the Civil Aircraft Agreement introduced 71 "actual-use" provisions into the TSUS. The interests of good administration argue strongly against the utilization of this concept except under most limited and exceptional circumstances where enforcement is possible.

A further example of the utilization of very poor classification techniques is found in the method adopted to eliminate the American selling price (ASP) basis for valuing imports of so-called benzenoid chemicals. The method adopted is a permanent transformation involving the introduction of 243 new product classes the use of which is controlled by two chemical appendices to the TSUS listing almost 12-thousand chemicals. One appendix--589 pages in length--lists the chemicals in alphabetical order, whereas the other one--681 pages in length--lists them in the order of Chemical Abstracts Service (CAS) Registry Number.

Poor drafting techniques have also compromised the integrity of the TSUS in the provisions implementing GSP and the concessions granted in the Tokyo Round. The new product classes added for this purpose totalled well over 200. If is difficult to determine the impact of a rash of 40 bilaterals entered into by the United States. The schedules of concessions and the texts of the terms and conditions consist of a miscellany of documents that were scattered far and wide.

The severity of the interpretative and administrative TSUSA problems now confronting Customs at U.S. ports of entry is highlighted in two reports made by the Comptroller General to the Congress on September 7, 1978, and April 23, 1981, on the inability of Customs static work force to inspect and process cargo properly, and to handle the increased work load of classifying imports to determine their duty status.

Section 608(d) of the 1974 Trade Act requires the Commission to make an investigation under section 332(g) of the Tariff Act to provide the basis for the formulation of an international commodity code and full and immediate participation by the Commission in the U.S. contribution to technical work of the Harmonized System Committee to assure recognition of the needs of the business community in the development of a harmonized code for international use for tariff and statistical purposes.

The concept of a "harmonized" code for international adoption contemplates an eclectic system utilizing sound principles of product nomenclature gleaned from a study of extant systems such as the Customs Cooperation Council Nomenclature (CCCN)--the successor to the Brussel's Tariff Nomenclature (BTN)--and the TSUSA. Thus, there could be developed a new system better suited to the needs of participating countries.

The Harmonized System, as presently constituted, is the old BTN with a facelift but without important organizational and conceptual changes that are needed to better suit it for its intended purposes. Its o[illegible]ation and numbering system are poorly conceived and, if ado[illegible] [illegible] proliferate the legal and statistical classes of the TSUSA [illegible]haps as much as 50 percent. The Harmonized System has pr[illegible] digits thereby required the substitution of an 8- a[illegible]ries of item numbers to identify legal and statistic[illegible] [illegible]uct classes of the TSUSA.

For the past decade, Federal agencies--the Commission in particular--have been expending an inordinate portion of their resources in unrewarding efforts to convert the TSUSA into the format of the BTN and its successor, the CCCN. At the same time, they have almost wholly ignored their statistical responsibilities under section 484(e) of the Tariff Act. As a consequence, trade analysts and the makers of U.S. foreign trade policy are foredoomed indefinitely to make their decisions and construct their reports from a witches' brew of distorted data wrenched from the uncompromisingly disparate statistical enumerations of the TSUSA, Schedule B and the SIC.

Common sense would seem to dictate that the United States should have directed its resources so as to achieve an improved, viable TSUSA and comparability of U.S. trade data, as contemplated by the law. From that point of vantage, the United States could have had not only the derivative benefits of improved tariff administration and trade data but, also, could have better participated in and made major contributions to the formulation of a viable CCCN suited to the informational and foreign trade policy needs of all participating countries.

Suggestions: In view of the foregoing, it is suggested that--

23) a program should be initiated to achieve viable product descriptions in the TSUS and U.S. foreign trade statistics; and

24) the Subcommittee may want to ask the Commission for a report on the present status of the Harmonized Systems project and the schedule for its completion.

JUDICIAL REVIEW

The hallmark of good law is its planned continuity and predictability and its susceptibility to orderly change by duly constituted authority, as required or desired to best fulfill the purposes of the law and its reason for being. Good law is not spawned, nor does it exist, in a conceptual vacuum; it is the product of many persons of various talents acting conjointly in its enactment and in its application.

U.S. foreign trade law is no exception. As with all other law, it, too, is the product of coordinated activity of many participants both in and outside of the Government. Between the two actions of congressional consideration and passage of a statute and the President's approval thereof, an elaborate process--unnecessary to recount in this paper--takes place. Suffice it to say, the following persons participate, in varying degrees: (a) committees of the Congress and their consultants and staffs; (b) officials of trade agencies and their staffs; and (c) members of the trade community, including the Bar.

After the legislation is approved by the President and thus becomes a part of the law of the Land, it is tested before the agency or agencies responsible for its administration. The crucial determinations of these agencies are, in certain circumstances, subject to review by one or more of the Federal Courts. Thus, the judiciary protects interested parties from arbitrary actions or reversible errors of law or fact.

Unfortunately, the activities of the various trade agencies involved in carrying out the Tokyo Round and related activities have resulted in a state of factual and conceptual chaos and confusion that is not conducive to the development of good law. The Trade Agreements Act of 1979 is so convoluted and lashed with administrative deadlines, provisions for interlocutory as well as final judicial review, etc., that only affluent litigants can indulge in its mysteries. Even then, the practice of law before the foreign trade agencies has degenerated into persuasion not on the basis of the relevant facts and legal concepts but rather by a marshalling of irrelevancies and borderline relevancies.

Suggestion: In the circumstances, it is suggested that--

> 25) the provisions authorizing interlocutory judicial review of agency determinations under title VII of the Tariff be repealed. See suggestion No. 11 on page 20.

CONCLUSIONS

It follows from the foregoing comments that the U.S. foreign trade laws are in urgent need of selective amendments and that the creaking, unstable administrative structure requires the healing balm of restoration and strengthening of basic agency functions.

A fundamental weakness that requires prompt attention arises from the failure of the Government to provide a continuous basis for career manpower and expertise needed at U.S. ports of entry to promptly and effectively process and collect accurate trade data on all commercial transactions whether such imports are dutiable or free of duty, as well as to provide effective enforcement action in regard to contraband and controlled articles. They could also be invaluable if they were utilized more effectively to enforce the collection of proper export statistics at U.S. ports of exit.

The cost of developing the professional expertise and procedures for collecting accurate trade data in relevant product detail would entail additional costs. But, if we are serious about our efforts to analyze and understand and predict the ebb and flow of U.S. trade, the cost outlay would be well spent. Moreover, the cost could probably be defrayed at a fraction of the present cost of publishing and distributing the many volumes of fictitious trade information now issued.

Needless to say, the serious consequences of the conceptual and data problems outlined herein adversely affect almost every facet of U.S. foreign trade policy and its administration.

U.S. trade officials should call a moratorium on their excessive and indiscriminate use of the U.S. trade agreement and GSP authorities to carve out narrow, unclear product classes that provide for minuscule duty differences. Such activities not only unduly proliferate the provisions of the TSUS and compromise its integrity and administerability; they also compromise the goals of the basic U.S. trade agreement program itself.

Instead, the United States should devote sufficient time and resources to the achievement of basic goals, long overdue, of bringing all trade agreements entered into by the United States into conformity with principles promoting the development of an open, nondiscriminatory, and fair world economic system, as authorized and provided for in section 121 of the Trade Act of 1974. Such activities would breathe life into the President's frequent espousals of the principles of free trade. At this juncture, the GATT appears to be the only multilateral vehicle having the potential for easing world tensions through the establishment of fora and reasonable procedures and legal criteria for the settlement of trade disputes between nations.

In this latter regard, the Tokyo Round negotiations directed toward establishing international safeguard procedures, as authorized under section 107 of the 1974 Trade Act, were not successful. It will be recalled that the United States succeeded in getting the incorporation of a safeguard procedure into the GATT, viz, the escape-clause provisions of Article XIX. Thereafter, the Congress has legislated different criteria mostly to relax the criteria so as to make import relief more accessible to U.S. producers. The changed criteria have never been incorporated into Article XIX of the GATT. If, as suggested in the Subcommittee's notice, the international dispute settlement process is to be made more efficient and effective, it would seem that the United States should refrain from unilateral modification of the criteria therefor and should seek such modification in accordance with the rules of the GATT.

The fast-track implementing procedures of the Congress which were utilized for the Trade Agreements Act of 1979 defy all precedents in regard to trade agreements legislation. Although the President had made generous use of the authorities delegated to him in the Trade Act of 1974, he did not have prepared and submitted to the Congress the usual Administration draft bill together with an analysis thereof. From the outset, the Congress--the Committee on Finance of the Senate in particular--took charge of the matter and thereafter dominated and controlled the substantive content of the measure that emerged as the Trade Agreements Act of 1979.

Considering the magnitude and importance of the subject matter involved and the time pressures inherent in the fast-track procedures, it comes as no surprise that the results are less than acceptable either in the short or the long run. The Congress and the President either did not have available to them, or did not effectively utilize, persons having the requisite knowledge and experience for such an undertaking.

In my opinion, short-cut procedures in the legislative process are not conducive to the development of sound legislation.

Suggestions: In view of the foregoing, it is suggested that--

26) the United States should actively pursue its GATT goals as expressed in sections 107 and 121 of the Trade Act of 1974; and

27) any bill on the subject matter of this hearing should include a provision repealing the fast-track provisions in section 151 of the Trade Act of 1974.

Supplemental Statement of Russell N. Shewmaker

This submission supplements my statement of May 4, 1983. It provides additional commentary with respect to market disruption (sec. 406, Trade Act of 1974), dumped and subsidized imports (title VII of the Tariff Act), and misuse of the trade remedy laws.

Market Disruption

In my suggestion No. 3, it is stated that "section 406 should be amended so as to become the basic import relief proclaimed by the President to offset market disruption occasioned by imports the product of a nonmarket economy country."

Section 406 is presently limited in its application to U.S. import relief measures against products of one or more communist countries. In Senate Report No. 93-1298 on H.R. 10710, the bill which became the Trade Act of 1974, it is stated (on page 211) that--

> Section 406, unlike the rest of Title IV, would apply to all communist countries--whether or not they currently receive nondiscriminatory treatment and whether or not they ever receive nondiscriminatory treatment under this Title.

Accordingly, the effect of this suggestion would be to enlarge the scope of section 406 so that it would apply to U.S. imports the product of *noncommunist* as well as those of *communist* nonmarket economy countries.

If for no other reason, section 406 is a suitable import remedy to replace the provisions of title VII of the Tariff Act inasmuch as, under subsection (b) thereof, the President may proclaim quantitative restrictions and/or increased duties on the offending imports and his action can be taken only with respect to imports from the country or countries involved of an article with respect to which the affirmative determination was made by the Commission. See my suggestion No. 13.

Dumped and Subsidized Imports

In the explanation of my suggestion No. 8, it is stated that most of the problems associated with these laws are inherent in the provisions therein for their dual administration, and that one-agency administration is a necessity.

The dual-agency syndrome begins when the petition is filed. The law provides that the petition shall be filed with Commerce, and, on the same day, a copy thereof shall be filed with the Commission. It further provides that Commerce shall, within 20 days thereafter, determine whether a formal investigation is warranted. The statute assigns no role to the Commission in connection with the initial determination as to the sufficiency of the petition, but, strangely, does provide that the petition may be amended at such time, and upon such conditions, as Commerce and the Commission may permit.

Under prior law, Treasury determined the sufficiency of the petition, but, before doing so, promptly provided a copy thereof to the Commission for the purpose of obtaining informal assistance, particularly in regard to defining the product scope of the potential investigation and assessing the information submitted in support of the allegation of import injury.

Now, however, it is the questionable, if not illegal, practice of the Commission to institute a preliminary investigation immediately upon receipt of its copy of the petition, without waiting for Commerce to make its determination as to the sufficiency of the petition. Not uncommonly, the product scope of the Commission's notice and of that subsequently issued by Commerce is different--a situation that could possibly result in a judicial invalidation of an antidumping or countervailing duty order issued at the conclusion of an investigation.

The Commission's practice is questionable in other respects. With the premature publication of the notice commencing its preliminary investigation, the Commission also submits to domestic producers, importers, wholesalers, etc., questionnaires which, as explained previously (see my statement of May 4, 1983, at pages 15-25), are deficient in the pricing data they seek.

The Subcommittee's notice asked for comments on proposals it had received for the simplification of calculation procedures. It is assumed that this has reference to the procedures for calculating the "margins of subsidization" and the "margins of dumping." In this regard it is suggested that simplicity is not an end in and of itself. Indeed, Commerce and the Commission have achieved the ultimate in simplicity with their weighted-average pricing methods, as applied, for example, in the investigations of the basic shapes and forms of carbon and specialty steels. In these investigations, the varying prices of hundreds of diverse products have been regimented willy-nilly into computer programs which translate them into a single so-called weighted-average margin of dumping or subsidy, as the case may be. Despite the number of transactions recorded in these manipulations, the seeming efficacy of the end results, i.e., the "margins", is, upon inspection, found to be far removed from the pricing realities of the marketplace.

Without the over-simplifications involved in the weighted-average pricing methods employed by Commerce and the Commission, these investigations could not have been undertaken and completed. Nor should they have been. (See my statement of May 4, 1983, at page 32, regarding the misuse of the trade remedy laws.)

Additionally, for years, U.S. steel producers have sought import quotas on shipments of foreign steel to lessen the competition from foreign producers of steel. For more than five years now, the U.S. Government has engaged in feverish activity on behalf of U.S. steel producers. As a planned prelude to, and justification for, the imposition of import quotas, this activity took the form of all-out efforts to vest steel imports with the coloration and persuasion of being unfair under the antidumping and countervailing duty laws. These efforts did not succeed. Nevertheless, after the enactment of a special bill in late

August of 1982, the U.S. producers withdrew their petitions, as planned and specially provided for in title VII of the Tariff Act. Thereafter, quotas on imports of carbon steel became a reality.

In the meantime, the disposition of an escape-clause investigation and an antidumping investigation instituted by the Commission and Commerce at the request of the President under section 301 of the Trade Act of 1974, is still pending with respect to imports of specialty steel. See my statement of August 4, 1983, at page 28.

In the circumstances, it is my belief that the calculation procedures of Commerce and the Commission are not in need of simplification. Rather, it is my suggestion that--

28) action should be taken to restore the calculation procedures previously established when the Antidumping Act, 1921, was jointly administered by the Treasury Department and the Commission, as described in my statement of August 4, 1983, at pages 16-17.

Chairman **Gibbons**. That is exactly the reason why I want to take these things one at a time, having a broad concept. You know, over the years we have passed this law so many times, in one bill we will amend it four or five different places, we have kind of merged everything and messed everything up. That is why I want to go deliberately about trying to improve these laws.

Mr. **Shewmaker**. I agree.

Chairman **Gibbons**. We may have made some mistakes, but I think if we thoroughly understand one law before we go on and try to tackle another one, we are going to do a better job. We need an overall concept of what we are doing. I want to do a workmanlike job and then go on to the next subject in that whole area.

Mr. **Shewmaker**. Yes.

Chairman **Gibbons**. I have worried that we have so spread this decisionmaking around and exposed it to different types of influence that it has become ineffective. What do you say, Mr. Frenzel?

Mr. **Frenzel**. I am just sitting here enjoying, Mr. Chairman.

Chairman **Gibbons**. I see you making notes over there.

Mr. **Frenzel**. I have made a lot of notes, but I must admit to the same kind of confusion that you do, and as part of your thought that we ought to proceed very carefully and not on all fronts at the same time.

Chairman **Gibbons**. We just do not have the intellectual capacity within my brain, and if you can devote yourself to the subject matter entirely, you could have it. I feel we are inadequately prepared for having the capacity to tackle it all at one time. That is why I want to break it up. We do not have the 50 years' experience either that Mr. Shewmaker has.

Mr. **Frenzel**. The other problem is that to do some of the things Mr. Shewmaker would like us to do, we do not have the votes.

Chairman **Gibbons**. That is always a practical part of it.

Mr. **Shewmaker**. One aspect of this on dumping, I would like to tell you about it, because essentially what I am talking about is restoring, not anything new, but restoring what had been and what got lost in the shuffle. In terms of pricing, to me the pricing aspects of dumping and countervail are central to the whole business. You must distinguish escape-clause proceedings from those for dumping and countervail, which in the issue presented here is the essential difference between having trade agreements and not having any.

Here the question that I address is the loss of agency capability and what the Treasury and the Commission used to do. In the years when the Secretary of the Treasury and the Commission jointly administered the Antidumping Act, they established procedures under which the Treasury, upon making an affirmative determination with respect to less-than-fair-value sales, promptly furnished to the Commission the Treasury file for the case including the worksheets for a 6-month or other appropriate sample period investigated by Treasury. The worksheets provided a complete price chronology that identified in the U.S. marketplace and gave the specific pricing and other details for each U.S. import transaction examined by Treasury for the sample period. The Commission, armed with this essential pricing data, was able to plan its import injury investigation so as to identify in the U.S. marketplace the actual or potential contemporaneous transactions involving the specific comparable domestic products that were being adversely affected by dumped imports.

The obvious benefits derived by the Commission from utilization of the Treasury file in each case came to an end in the wake of an ill-advised, devastating reorganization of the Commission's professional staff in the mid-1970's. It caused a rash of resignations and transfers of knowledgeable professionals, one of the immediate consequences of which was the loss of pricing expertise at the top level. The Treasury files were locked in the file drawers for the duration of the Commission's investigation, after which they were returned to Treasury.

With the transfer of the Treasury function to Commerce, effective January 1, 1980, the Commission no longer receives and almost never asks for the Commerce file. Moreover, even if the Commission were to receive the file, the pricing data provided therein are not useful for making the critical price comparisons needed. Since Commerce, not the Commission, is required under the law to determine whether U.S. imports are being dumped or subsidized, the Commission's practice of using import pricing data it has gathered for the purposes of its preliminary and final determinations is not legally defensible.

As matters presently stand, both the Commission and Commerce utilize weighted-average prices for heterogeneous classes of articles. These averages obscure any true pricing profiles that may have crept into the computations for the product mix. The Commerce notification to the Commission of an affirmative dumping or subsidy determination provides an overall weighted-average margin that has no probative usefulness whatsoever for the purpose of the Commission's import-injury determination.

The questionnaires and reports issued by the Commission in cases involving allegations of unfair or discriminatory pricing of U.S. imports utilize the same set of economic indicators as are used by the Commission in its escape-clause determinations. These indicators include among others increased quantities of imports, and weighted-average prices on a quarterly basis for a 5-year period. In this regard, the sine qua non for relief under the escape clause is increased imports, whereas for relief under title VII of the Tariff Act, it is the unfair or discriminatory pricing of imports. Thus, in cases instituted under title VII, the combined practices of Commerce and the Commission in practical effect conspire to negate any possibility of their having useful pricing data that meets the criteria for import-injury determinations under title VII, and effectively substitute therefor the escape-clause standard of increased imports, but with the less demanding material-injury test of title VII applying instead of the more stringent serious-injury requirements of section 201 of the 1974 Trade Act. The net effect of the Commerce-Commission practices is to purvey and lend spurious coloration to their determinations whether they are affirmative or negative. In fact, the determinations do not satisfy the requirements of either the escape clause or title VII of the Tariff Act, yet on their face they purport to satisfy the requirements of title VII.

Chairman GIBBONS. On that note, we have to quit, because I have to go to a Democratic caucus.

This concludes the hearings on the remedy laws. The record will stay open until Friday, May 13.

[Whereupon, at 2:30 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

STATEMENT OF HON. SAM B. HALL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I want to make this as brief as possible, because you have been inundated with requests from our colleagues as well as business, labor, government, consumer groups, and the academic community to testify on procedures to improve both the letter and the enforcement of various trade remedy laws.

International trade is one of the most complex issues facing us in the latter half of the 20th Century, and I don't envy your job. You've got people pulling at you from every direction and constantly hanging over your head is the thought that the passage of certain trade laws could trigger an international trade war.

As we all know, the American people are becoming more accutely aware of international trade. Part of this is due to a general turndown in the economy and high unemployment. Obviously, the subject of excessive foreign exports to our shores is a convenient excuse for our economic woes by those who want a restraint on trade.

In short, there is a protectionist sentiment in this country that is growing stronger by the day. I see it in my own Congressional District. It is reflected over and over in my mail.

There are no quick answers to this problem. After all, no matter how oriented one's thinking may be toward free trade, no elected official can long ignore the adverse impact of excessive imports on his or her constituency.

In my own Congressional District a steel firm—Lone Star Steel— laid off some 4,000 people last year, and there is no question that the overwhelming reason was due to steel imports. I will be discussing the specifics of this situation in a moment.

However, in attempting to help displaced workers at the mill, I set up a meeting at the Union Hall between business firms, workers and federal contractors. One result of that meeting should be shared with this Subcommittee, because it impacts so heavily on the frustration that potential American exporting firms, especially small industries, face; namely, how to swim through the red tape associated with exporting one's commodities.

As we all know, the authority for establishing an export market is scattered throughout the federal system. In a nation like Japan this is not the case. If a potential Japanese exporter has a good product line, his government helps knock down the red tape rather than creating it.

As we all know, by the time most U.S. small busineses get banged around from pillar to post by a variety of federal agencies, they usually say to hell with it. So, as this Subcommittee looks for ways to improve the American trade situation, I would hope that attention would be given to placing most, if not all, federal trade programs under one, umbrella agency.

Now, no one ever said that foreign trade is equitable. That's why the GATT was set up in the first place. But I have to believe that on balance the United States receives less than its share of equity in the international market place.

It is said that we already have the tools to combat foreign trade practices which discriminate against U.S. exports. However, it is often difficult to prove a case against unfair foreign competition. But a more aggressive mechanism just be found to prove discrimination, and in turn, do something about it, or the protectionist sentiment that argues strict quotes regardless of injury will eventually hold sway.

This is why these hearings are so important, and why they deserve close attention by Congress and the public. You have, as I understand, already looked into how United States-Japan trade matters are causing tremendous disruptions in what has been a strong alliance for the past 35 years. You are looking into how effective our enforcement of antidumping laws are, and God knows we could use some enforcement.

I know that last year some attention was given to legislation that would give the President more authority to meet unfair foreign trade practices and procedures. There was also a move afoot last year to give the U.S. Trade Representative more power on negotiations in trade. These seem like positive steps, and I know they will receive careful consideration by you.

Now, allow me a few moments to talk about some legislation that I have introduced on the problem created by imports of steel pipe and tube. This bears on the Lone Star Steel situation I mentioned a few minutes ago.

Now, I want to be very careful in stating that I am not attempting to use this Subcommittee hearing as a forum to testify on a bill that has not been scheduled for hearing.

As we all know, steel imports are an essential part of the import problem, The Steel Caucus, of which I am a member, has described the problem to all of us, so I won't reiterate.

What I am attempting to point out is the inequity of certain trade practices and how they can affect a once-healthy American industry. By the example I will provide you today, I know that you will appreciate what needs to be done generally to bring about changes in our trade policies and laws.

As you are no doubt aware, in 1982 there was an unprecedented build-up of inventories of steel pipes and tubes, particularly oil country tubular goods. This was the result of a sharp decline in U.S. demand in 1982, and continued high levels of imports which were excessive in light of changes in U.S. market conditions. U.S. producers were forced to react by drastically scaling back production causing a sharp increase in worker lay-offs.

The net result was that last Fall over 4,000 steel workers in my District who worked at Lone Star Steel Company were laid off. Most of those have not yet returned to their jobs. When you consider the so-called residuals, or ripple effect, some 8,000 more people were laid off in industries and businesses dependent on Lone Star Steel.

Lone Star is not alone. Most other U.S. producers of pipes and tubes were similarly affected. I am informed there are currently one to two year's worth of inventory of oil country tubular goods and sales don't look encouraging.

Late last year the Administration did attempt to do something about the top-heavy penetration of the American market place on oilfield country tubular goods by our European trading partners. But the arrangement only called for a consultation process in the event the EC imports exceeded a figure of 5.9 percent of the domestic market.

Even as I present this problem, there is strong indication that the European Community is exceeding the tonnages allowed by last year's Pipe and Tube Agreement. We can't be certain of this until we know what actual U.S. apparent consumption will be in 1983.

At this point all we have is a "forecast" of apparent consumption which is determined by DRI. I have reason to believe that DRI's initial forecasts have been wide of the mark in comparison to actual consumption. Once DRI revises it forecasts to reflect actual apparent consumption—which is the key statistic—then it will be obvious, I believe, that the EC is exceeding the Agreement and may be exceeding the limit by as much as 100 percent.

Mr. Chairman, these apparent trends are disturbing and extremely frustrating. Here, as in so many other cases, the ink is barely dry on a set of trade agreements before problems start developing. This is why I have introduced legislation which avoids the choice of either a "protectionist" response or of sitting idly by while specific written commitments are ignored. It only seeks to enforce compliance with rules and agreements already on the books. This is the essence of the approach in the legislation, which has been co-sponsored by 20 Members of the Texas Delegation.

It is intended to be fully consistent with the terms of the Steel Pipe and Tube Arrangement and merely sets out in advance the enforcement authority anticipated under the Arrangement to ensure compliance with the obligations assumed by both the U.S. and the Europeans. I want to make it clear that these authorities would be triggered only in the event that imports threaten to exceed the levels negotiated under the Arrangement itself and after the consultations required between the parties under the Arrangement fail to resolve the problems.

Before closing my remarks today, Mr. Chairman, I would simply wish to emphasize two basic points. First, it needs to be clear that this is not a case of an outdated or inefficient industry attempting to regain through political means, a competitive edge it has lost in the market place. Over the past decade, millions of dollars have been invested by the steel pipe and tube industry to remain highly competitive by world standards. The problems now facing the industry are primarily the result of import practices by other nations which have been largely unresponsive to U.S. market conditions.

Second, I would like to emphasize the difference between protectionism and the kind of legislation which I have described. I share the conviction that free international trade is vital to our own long-term economic growth as well as that of the rest of the world. At the same time, our trade policy must reflect the realities of the market place. We must recognize that international agreements like the Steel Pipe and Tube Arrangement must be respected by both sides if they are to succeed. When we wink at problems when they arise under these agreements or otherwise fail to take action, the results are factory closings and lay-offs. The failure of such agreements can only create more trade disputes with our major trading partners. Clearly, these are outcomes none of us want, nor do such outcomes discourage protectionist measures on either side.

Mr. Chairman, I appreciate the opportunity to appear before you today and at this time would be pleased to answer any questions which you or the other members of the Subcommittee might have.

STATEMENT OF HON. GEORGE C. WORTLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I would first like to express my appreciation to you and to the other members of the Subcommittee for allowing me to express my views. I hope that they prove helpful to you.

Preserving and strengthening the global free trade system is a goal that we all share. I need not enumerate the many blessings that free trade has bestowed on our generation. Nor do I need to discuss the negative impact that a collapse of free trade would have on our country and the world.

The point that I would seek to emphasize is that there is more than one way for the free trade system to be undermined. When a major trading nation implements protectionist trade barriers and/or unfairly subsidizes its exports at the expense of other nations, free trade has been eroded. What is less often realized is that the free trade ideal is also endangered when we allow these types of unfair trade practices to go unpunished.

During the past decade, many of our trading partners have instituted "beggar thy neighbor" policies whereby they heavily subsidize their exports. These policies have been prevalent in the European Economic Community; particularly in regard to agricultural exports. The effect of EEC policies on the American farmer has been a profoundly negative one. More recently, Canada has begun to heavily subsidize agricultural exports. Farmers in the Central New York area have lost a considerable share of the regional market as a result of these subsidies.

I urge my colleagues to realize that shielding our farmers from unfair trade is not protectionism. Quite to the contrary, we are obligated under the General Agreement on Trade and Tariffs to vigorously enforce our trade laws. When unfair trade practices go unpunished we merely encourage further erosion of the free trade standard. In the same way that limited military action is often necessary to maintain the general peace, limited sanctions against unfair trade practices are often necessary to maintain free trade. We must not be afraid to use the necessary sanctions when they are called for.

If those of us who believe in mutually beneficial trade cannot ensure that free trade is fair trade, we will soon lose the day to those who favor institutionalized protectionism. Our task is not an easy one. We must resist the urge to hide our economy behind high trade barriers. But we must also take prudent steps to protect our farmers and our vital industries from predatory trade practices. If we fail to do so, then the consensus in support of free trade will collapse.

Again, I thank you for giving me the opportunity to submit my views on this vital subject. I trust that the Committee will make wise choices in formulating an effective trade policy.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS,
New York, N.Y., April 26, 1983.

Hon. SAM M. GIBBONS,
Chairman, Subcommittee on Trade, Committee on Ways and Means,
U.S. House of Representatives,
Washington, D.C.

DEAR CHAIRMAN GIBBONS: The American Institute of Marine Underwriters (AIMU) is pleased to offer its views on the need to improve our nation's trade remedy laws. We hereby request that these comments be made part of the record of the hearing held by the House Ways and Means Subcommittee on Trade on April 19, 1983.

The American Ocean Marine Insurance Industry is gratified by the increasing interest in Congress regarding trade barriers imposed against U.S. goods and services by many of our trading partners. American marine insurers have been prohibited from competing for the insurance business on trade with many countries due to restrictive marine insurance measures. The list of countries prohibiting U.S. companies from insuring marine transportation risks on exports or imports is over 40 and continues to grow every year. Enclosed is our most recent report on those countries imposing such restrictive laws or policies. These barriers have prohibited U.S.

marine underwriters from competing for the premiums on a substantial portion of the goods in U.S. trade and our industry has suffered serious losses.

Unfortunately, domestic procedures designed to address unfair trade restrictions have not been successful in combating this growing problem. AIMU has filed two Section 301 complaints pursuant to the Trade Act of 1974. The inadequacy of current trade remedy laws is clear from the frustrations which marine insurers have encountered in attempting to overcome these restrictions.

The first of the Section 301 complaints filed by AIMU in November of 1977 was against the U.S.S.R. The Soviet Union restricted U.S. commerce by requiring that insurance on exports and imports between the United States and the Soviet Union be placed with the Soviet state insurance monopoly, Ingosstrakh. American marine insurers were precluded from participating in shipments of wheat to the Soviet union, trade which would yield millions in premium dollars. In June of 1978 the President determined that the Soviet practice restricted U.S. commerce within the meaning of Section 301 and established an interagency committee to focus on ways to eliminate any reasonable practices. Negotiations were held in Vienna and, in April of 1979, U.S. and Soviet officials signed a memorandum of understanding which provided that each party recognize the interest of the other in having a substantial share of marine cargo insurance resulting from U.S. Soviet trade. There was to be an annual review of the placement of this insurance and to evaluate the compliance with the memorandum. The USTR's investigation was suspended pending the outcome of the first annual review. Due to the disruption of relations and bilateral trade following the Soviet invasion of Afghanistan, the first annual review of the agreement was not possible and no further action has been taken. American marine insurers did not obtain any additional business as a result of the agreement and the USTR's investigation. In 1980, U.S. marine insurers underwrote little, if any, U.S.-Soviet business although there was substantial trade between the two countries, including shipments of 8 million tons of wheat. Soviet discriminatory practices against the American Ocean Marine Insurance Market continues unabated.

The second Section 301 complaint filed by the American Institute of Marine Underwriters petitioned for relief from unfair trade practices imposed by the Government of Argentina. Virtually all insurance on exports and imports must be placed with Argentine companies. The 301 Committee recommended that the U.S. request Argentina and other countries with similar restrictions attend future, multi-lateral trade negotiations aimed at seeking agreement for applying national treatment to foreign insurance firms. U.S. negotiators received a a commitment from Argentina to participate in multi-lateral negotiations and the Section 301 case was suspended pending the outcome of these negotiations. To date, the USTR has not initiated any negotiations and we know of no plans to do so. Our efforts to obtain relief were futile.

This record is indeed disappointing. Despite two Section 301 complaints, the American Ocean Marine Insurance Market has not secured the freedom to compete for the insurance business on trade with Russia or Argentina. There would be little point in bringing a Section 301 complaint against the more than 40 other countries imposing such restrictions since apparently the Section 301 procedures cannot obtain relief for aggrieved industries such as our own.

The American Marine Insurance Market seeks only the ability to compete freely for the insurance related to international trade. Given the ability to compete we can safely state that we will obtain a fair share of the insurance premium. When the actions of foreign governments interfere with the process of free choice, we believe that the U.S. government should vigorously assist in resolving the problems. We support efforts to strengthen the Section 301 remedies. We would be pleased to work with you and your staff on the development of a meaningful proposal to increase the effectiveness of U.S. trade remedy laws.

Very truly yours,

WALTER M. KRAMER,
Vice President.

AIMU,
WALL STREET,
New York, N.Y., July 15, 1981.

SUMMARY OF RESTRICTIVE MARINE INSURANCE MEASURES

The following countries have laws, decrees or regulations which interfere with the right of an American exporter (or importer) to negotiate freely the purchase of

transportation insurance:* Algeria (1), Argentina (1), (2), Austria (2), Bangladesh (1), Barbados (1), Bolivia (3), Brazil (1), Burundi (1), Colombia (1), Congo Republic (1), Dominican Republic (1), Ecuador (1), Egypt (2), Ethiopia (2), Gabon (1), Ghana (1), Haiti (1), Iran (1), (2), Iraq (1), (2), Italy (2), Jordan (1), Kenya (1), (2), Laos (2), Libyan Arab Republic (2), Mauritania (1), Mexico (2), Nicaragua (1), Nigeria (1), Oman (1), Pakistan (1), Peru (1), Sierra Leone (1), Somalia (1), Sudan (1), Syria (1), Tanzania (1), Tunisia (1), Uganda (3), Venezuela (4), Yemen Arab Republic (1), Yemen, People's Democratic Republic of (1), Zambia (2), (5).

EXPLANATORY NOTES

(1) Imports must be insured in domestic insurance markets.

(2) Tax and/or Foreign Exchange regulations impede U.S. insurance competition.

(3) Imports/exports, under national ownership, must be insured in a domestic or an admitted insurance company.

(4) All imports benefiting from partial or fully exemption of Customs duties must be insured in Venezuela.

(5) All exports must be insured in Zambia.

With all shipments financed by the United States Agency for International Development (AID), the American exporter has every right to negotiate freely the terms of insurance coverage. No prohibition against such freedom can be enforced. (Any effort to do so should be reported immediately to AIMU.)

THOMAS A. FAIN,
President.

Statement of the U.S. Tuna Foundation and the American Tunaboat Association

This statement is submitted on behalf of the various segments of the United States tuna industry for consideration by the Subcommittee on Trade of the House Committee on Ways and Means in connection with hearings held in March, April, and May, 1983, on the adequacy and effectiveness of trade remedy laws that are intended to protect U.S. industries. We request that this statement be included as part of the formal record of these proceedings.

The United States tuna industry consists of vessel owners and fishermen who harvest tuna from U.S.-flag fishing vessels, cannery workers who produce canned tuna and tuna by-products, and the processing companies which process and market the finished product through their sales organizations.[1]

The tuna industry has been found to be an import sensitive industry. The most recent finding was made on May 28, 1981 (46 FR 28779) in a decision by the Office of the U.S. Trade Representative in connection with the denial of a petition for duty-free treatment under the Generalized System of Preferences (GSP).

Even though GSP treatment was denied as a result of this decision, the tuna industry has nonetheless been vulnerable to a steady reduction of its domestic market share for canned tuna products. This reduction is caused by ever increasing imports priced at a level that cannot be met by the U.S. industry. This is true even though the United States tuna industry continues to lead the world in the development of technology for the efficient and economical harvesting and processing of tuna. As a result, the tuna industry is acutely interested in this Committee's oversight of U.S. trade laws and submits this statement to set forth its views.

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*Some countries engaging in restrictive marine insurance practices are not included because of lack of clarity or proof of discrimination (e.g., by taxes, foreign exchange control, reinsurance practices, etc.)

N.B.: Not all state monopolies are included in AIMU's listing, e.g., U.S.S.R. and other countries, where state monopolies exist.

[1] The major vessel owner organizations are the American Tunaboat Association, San Diego, which represents the majority of the large purse seine vessels operating from California, Puerto Rico, American Samoa, and Guam; the Western Fish Boat Owners Association, San Diego, which represents the majority of the bait boats and trollers, primarily producing albacore tuna and operating from California, Oregon, Washington, and Hawaii; and the Fishermen's Cooperative Association, San Pedro, which represents purse seine vessels operating from the Los Angeles Harbor area. The major labor organizations are the Fishermen's Union of America, Pacific and Caribbean area, affiliated with the Seafarers International Union of North America, AFL-CIO; the United Industrial Workers-Service, Transportation, Professional & Government of North America, affiliated with the Seafarers International Union of North America, AFL-CIO; the International Longshoremen's & Warehousemen's Union; the International Union of Operating Engineers, AFL-CIO; the Congress of Industrial Unions of Puerto Rico; and, the United Steelworkers of America, AFL-CIO. The major processing companies are Bumble Bee Seafoods, San Diego, Calif., and Ponce, P.R., a division of Castle & Cooke, Inc.; Mitsubishi Foods, Inc., Del Mar, Calif., and Puerto Rico; Neptune Packing Corp., Mayaguez, P.R.; Pan Pacific Fisheries, Terminal Island, Calif., a subsidiary of C.H.B. Foods, Inc.; Star-Kist Foods, Inc., Terminal Island, Calif., Mayaguez, P.R. and Pago Pago, American Samoa, a subsidiary of H. J. Heinz Co.; and Van Camp Seafood, San Diego, Calif.; Ponce, P.R. and Pago Pago, American Samoa, a division of Ralston-Purina Co.

This statement will elaborate on the following points:

U.S. trade laws are intended to be balanced. They are designed to foster economic growth and employment in the United States and positive economic relations abroad. Trade barriers are to be lowered, commensurate with equivalent economic opportunities for U.S. products in foreign markets. Adequate safeguards are to be provided to protect U.S. industry and labor against unfair or injurious and labor against unfair or injurious foreign competition.

The United States tuna industry has been competitive in supplying a valuable and wholesome food product, representing about two-thirds of U.S. canned fishery products consumption, but it is nonetheless import sensitive. The industry has been recently harmed by low priced imports of canned tuna, a situation which is growing progressively worse.

Policies of the U.S. government have historically given special consideration to our relationships with our island territories and possessions, two of which are extremely important to the tuna industry: American Samoa, where tuna represents by far the dominant export industry and the largest private company employer; and the Commonwealth of Puerto Rico, where canned tuna represents the largest single line item by value of its shipments to the United States.

United States fisheries policies have long supported the U.S. fishing industry in general, and the tuna industry in particular. Policies found in the Magnuson Fishery Conservation and Management Act, for example, provide special incentives and support for all segments of the U.S. fishing industry including tuna. These policies and principles were recently affirmed in President Reagan's Proclamation declaring an Exclusive Economic Zone.

A PROFILE OF THE U.S. TUNA INDUSTRY

Amercian consumers have long enjoyed the tuna sandwich, the tuna salad, and other tuna dishes which have become staples of the American diet. Canned tuna is recognized as an economical and high quality protein product. In order to compete in the U.S. marketplace, canned tuna products must be priced competitively with other sources of low cost protein products, such as hamburger and poultry. The U.S. tuna industry has suceeded in doing this by pioneering innovative and economical means of harvesting, processing and marketing tuna.

One of the great strengths of the U.S. tuna industry has been its tuna fleet which is made up of three types of vessels: (1) large and small tuna purse seine vessels; (2) bait boats; and (3) troll vessels. The tuna purse seine vessel is recognized as the most economical and productive fishing vessel in the world. It accounts for over 90 percent of the annual U.S. harvest of tunas. The U.S. fleet landed approximately 250,000 tons of tuna valued at nearly $285 million in 1981.[2] This represented about 45 percent of the light meat tuna canned in the United States during that year. While final catch statistics have not been published for 1982, the U.S. fleet's total catch was less than in 1981 but its percentage share of the tuna canned in the United States increased to approximately 55 percent.

The United States purse seine fleet is composed of some 132 vessels. This group of vessels is considered to be one of the most efficient and imitated fishing fleets in the world. The present cost of an average purse seine vessel (approximately 1,200 tons carrying capacity) is between $10,000,000 and $13,000,000. On this basis, the replacement cost of the purse seine fleet (capacity about 124,000 tons) is between $930,000,000 and $1,116,000,000. This highly mobile high seas tuna fleet operates in most of the major oceans of the world.

In 1981 and 1982, the recession and an overabundance of poultry products and other competitive protein products occasioned an over-supply of tuna products in the domestic tuna market. This caused prices paid to U.S. tuna vessels for landed tuna to drop by 15 to 25 percent. Also, we are presently experiencing an oceanographic phenomena known as El Nino (warm water temperatures which have resulted in substantially reduced fish catches in the Eastern Tropical Pacific Ocean). This has resulted in placing the U.S. high seas tuna fleet in a precarious economic position. While price and fish catch continue to decline, operational costs have risen.

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[2] Fisheries of the U.S.: 1981.

A combination of these factors has caused approximately 25 U.S.-flag tuna vessels to be left dockside with their future much in doubt.

Until a few years ago, most canned tuna was packed in soybean oil. For the last several years, tuna packed in water has become a more and more popular nutritional item. The domestic processing companies, recognizing the consumers desire to maximize nutritional value while minimizing caloric intake, developed a substantial market in the United States for tuna packed in water. Ironically, the domestic processing companies were creating a marketplace vulnerable to foreign imports of tuna packed in water priced at levels that does not permit the domestic processing companies to remain competitive.

THE MARKET FOR CANNED TUNA AND THE HISTORY OF DUTIES

The United States is by far the dominant market in the world for canned tuna products. Because of the size of the U.S. market, U.S. processors are dependent not only on tuna caught by the domestic fleets but also on imports of raw tuna from every important fishing country and ocean area of the world.

The United States consumes approximately 40 percent of the world's harvest of tunas, almost all of it in the form of a canned product. The next largest consumer of tuna is Japan which offers the fish primarily in the raw, smoked or dried form. Europe represents the third largest and growing market for tuna products, and like the United States, preference is given to canned tuna products.

Imports of canned tuna to the European Economic Community countries are dutiable at 24 percent ad valorem, while Japan has a complex set of trade regulations which protect their domestic fishing industry from any threat of import penetration. In the United States, there is a more liberal trade policy which permits frozen tuna imports duty-free and allows foreign fisherman to unload tuna catches directly at ports located in U.S. territories, such as Guam, American Samoa and the Northern Marianas.

With regard to canned tuna imports to the United States, the first duty rate of 22.5 percent ad valorem was established in 1932. This was increased to 45 percent in 1934, reduced at the outbreak of World War II to 30 percent and later restored to 45 percent in 1951. In the early 50's, tuna canned in water (brine), as opposed to oil, became an object of commerce in the United States. There was no specific trade classification for this product and no studies were made for the proper duty rate. It was arbitrarily placed in a "basket" category of fish in brine and assigned a 15 percent ad valorem duty rate.

The duty on tuna canned in oil was subsequently reduced to 35 percent in the 1955 round of GATT discussions. At the same time, tuna canned in water was reduced to 12.5 percent ad valorem for all imports exceeding 20 percent of the previous year's domestic pack. The duty on imports below 20 percent of the previous year's domestic pack was to be reduced successively over a 5-year period from 12.5 percent to 6 percent. At the time of the 1955 GATT discussions, tuna packed in water was a very small import item. The duty rates established for canned tuna products in 1955 are presently in effect.

As a result of the lower duty treatment for tuna packed in water nearly all of the canned tuna imports (99.7 percent in 1982) have been tuna packed in water. This has resulted in a substantial decline in the U.S. tuna industry's domestic market share for tuna packed in water. The reason for this decline can be traced in part to those factors which are causing other U.S. industries to lose U.S. market shares to foreign imports: lower foreign wages, foreign government subsidy programs, a strong U.S. dollar, lack of foreign government environmental and regulatory controls.

The tuna industry is presently assessing its options for seeking redress against foreign imports of tuna canned in water which are supported by a complex set of subsidies and tax incentives provided by certain foreign governments. For example, the government of the Republic of the Philippines offers a panoply of special tax assistance and incentives in order to attract exporting companies and to assist them in penetrating foreign markets, such as the United States. Moreover, plants in the Philippines have a natural competitive advantage in producing canned tuna products as a result of their extremely low labor costs and far less expensive government regulatory costs. This has resulted in a dramatic increase in imports of tuna packed in water from the Philippines: 700,000 pounds in 1979 to 27,600,000 pounds in 1982; and 3,900,000 pounds in January/February 1982 to 6,000,000 pounds the first two months of 1983.

The U.S. tuna industry, through the Tuna Research Foundation, filed a petition, dated March 11, 1983, alleging that the Republic of the Philippines does in fact grant to its producers, manufacturers, or exporters of canned tuna products, bounties or grants within the meaning of Section 103 of the Tariff Act of 1930, as amended. The Department of Commerce initiated an investigation on April 11, 1983, with a preliminary determination to be made on or before June 6, 1983.

The U.S. tuna industry must also compete with government subsidized industries, such as is the case in Mexico, where the government has publicly announced its intention to replace the United States as the leading tuna producer in the Eastern Tropical Pacific Ocean area. To back this up, the Government of Mexico invested large sums of money in the purchase of tuna vessels and the construction of tuna processing facilities.

In summary, the United States is the world's largest market for canned tuna products. It will remain so because of the dietary preference of U.S. consumers. This is evidenced by the fact that canned tuna products represent nearly two-thirds of the canned seafood consumption in the United States. Given this fact, the significant trade questions for the United States and the domestic tuna industry are the effect of canned tuna imports on the established U.S. market, employment in the United States and its territories, and the overall United States balance of trade.

THE GENERAL POLICIES OF U.S. TRADE LAWS

The elemental content of our trade policies is contained principally in the Tariff Act of 1930, the Trade Act of 1974, and the Trade Agreements Act of 1979. Together these statutes provide a blueprint for U.S. involvement in world trade negotiations.

The Congressional Statement of Purpose contained in section 2 of the Trade Act of 1974 is broadly drafted and serves as a guideline for U.S. trade efforts. This provision states that the purposes of the law are, through trade agreements affording mutual benefits to:

(1) Foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and non-discriminatory world trade;

(2) Harmonize, reduce and eliminate barriers of trade on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States;

(3) Establish fairness and equity in international trading relations, including reform of the general agreement on tariffs and trade;

(4) Provide adequate safeguard procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers and communities to adjust to changes in international trade flows;

(5) Open up market opportunities for United States commerce in non-market economies; and

(6) Provide fair and reasonable access to products of less developed countries in the United States market.

Obviously some of these goals are mutually inconsistent and in any particular situation they must be weighed and applied in conjunction with all other relevant policies contained in domestic statutes applicable to the concerned industry.[3]

It is noteworthy that Section 122 of the Trade Act dealing with authority to limit imports in order to correct balance of payment deficits gives the President a mandate not to proclaim any special or temporary measure in any situation where such measures might cause or contribute to the material injury of the domestic fishing indutry,[4] among others. This provision, we submit, is in recognition of the special standing given to the fishing industry in the context of the U.S. trade laws.

U.S. trade policies must be pursued in harmony with the statutory responsibilities and policies enunciated by the Congress. A series of statutes has been enacted, beginning with one of the very first passed by the Congress in 1793, aimed at promoting and protecting the domestic fishing industry. Various government programs have been put into effect to foster and protect an industry which has long been recognized by most countries as having a special protected status as a producer of food and local employment.

Moreover, viewing our international balance of trade, fish products represent a greatly disproportionate share of the trade balance deficit. In 1980 the excess of fish product imports over exports represented $2.6 billion, or 11 percent of the trade balance deficit. This excess increased to $3 billion in 1981, or 15 percent of the total trade balance deficit.[5] In 1982, the excess amount is estimated at $3.5 billion. Any action which increases dependence on imports of fish products that can be supplied domestically is inimical to this nation's general well-being.

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[3] The Magnuson Fishery Conservation and Management Act (16 U.S.C. § 1801, et seq.) and the American Fisheries Promotion Act (Public Law 96-561) are two statutes containing policies which call for active Federal government support and encouragement of the U.S. fishing industry.

[4] 19 U.S.C. § 2121.

Also to be considered are U.S. policies with respect to island possessions which are designed to protect the fragile economies presently in place. In recent years, over 50 percent of the tuna canned in the United States was processed in Puerto Rico or American Samoa.[6] The importance of tuna processing to these two island governments was one reason the House Ways and Means Committee accepted an amendment exempting tuna from the duty-free provisions of the Caribbean Basin Economic Development Act.[7] Puerto Rico depends heavily on the tuna industry for employment in Ponce and Mayaquez, two important tuna canning cities. In American Samoa, not only is the employment opportunity vital, additionally, the tuna industry provides 99 percent of all exports by the government.

Throughout our history, the public policymaking bodies of the United States have attempted to resolve the fundamental dilemma between the nation's traditional philosophy of free, open, and competitive trade and the need to protect essential industries and provide jobs for our citizens. Obviously a world system of relatively free trade greatly benefits our nation. On the other hand, as the largest consumer market in the world, it would be patently ridiculous for the United States to allow itself to serve as an unrestricted market for everyone else's goods and progressively eliminate our own. Somehow a balance must be struck.

THE TUNA INDUSTRY EXPERIENCE WITH U.S. TRADE LAW

In 1975 and again in 1980 the Office of the Special Trade Representative conducted hearings at which testimony and advice was provided by the tuna industry.

The 1975 hearing was held in order to receive testimony on which to base recommendations to the President prior to multinational trade negotiations. After receiving testimony from the U.S. tuna industry, the Special Trade Representative recommended that existing tariffs on tuna products be retained and not be subjected to possible reduction during the planned multilateral trade negotiations.

In 1980, a proceeding was begun by the U.S. Trade Commission and the Trade Representative's office in response to a request by the Governments of Malayasia and Morocco for elimination of the tuna tariffs under the Generalized System of Preferences. The petitions of the Governments of Malayasia and Morocco were denied on the basis that the tuna industry was import sensitive. The existence of the U.S. policies supporting the economic well-being of U.S. fisheries and insular possessions discussed earlier in this paper played a key role in the outcome. While the results of the hearings were favorable, the industry had to expend a substantial amount of time and funds to present their case to the Special Trade Representative's Office and to the U.S. Trade Commission.

More recently in 1982, the industry was again required to offer evidence as to why it should be granted an exemption from President Reagan's Caribbean Basin Initiative. The tuna industry provided information to member of Congress and to the President's advisors demonstrating both the vulnerability of our industry and its importance to American Samoa and Puerto Rico. As a result, the House Ways and Means Committee accepted a provision exempting canned tuna from the proposed duty-free treatment. In the 98th Congress, the Administration has resubmitted its Caribbean Basin Initiative (S. 544) bill with a tuna exemption contained therein. We strongly support this exemption.

At present the industry is analyzing the availability of trade remedies to cope with what we believe are unreasonably low priced imports of canned tuna packed in water. As we evaluate the trade remedy laws (such as Section 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979), we find that many of the presumptions inherent in the administration of these provisions, the amount and quality of proof required, and the general complexity of the special inducements and benefits provided by foreign governments all combine to make these remedies very difficult, time consuming and expensive to persue. Moreover, we find them limited in scope because of their focus under the Trade Act.

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[5] "Fisheries of the United States: 1981"; U.S. Department of Commerce; April 1982.

[6] Statement of Resident Commissioner of Puerto Rico Baltasar Corrada; 128 Cong. Rec. 10155; December 17, 1982. Statement of the Delegate of American Samoa, Fofo I. F. Suhia; 128 Cong. Rec. 10145; December 17, 1982.

[7] Statement of Congressman Douglas K. Berenter; 128 Cong. Rec. 10156-10157; December 17, 1982.

In our opinion, these remedies do not adequately take account of other U.S. laws and policies which should be relevant to any determination of remedy in the fisheries area. It is difficult for the administrative bodies involved, given the very narrow mandate contained in the trade laws, to take a broader view of all the factors that should be considered. Consequently, we remain dubious about whether relief will come or will come in time to prevent the loss of more of our market to cheaply priced imports.

In summary, the United States tuna industry is providing this statement so the Subcommittee on Trade will be more familiar with trade implications that affect the tuna industry. It must be kept in mind that, while tunas come from the world oceans and while the market for tuna products is worldwide, the U.S. market is the critical trade arena for the canned product which has become a staple of the U.S. consumer.

Our initial feeling is that U.S. trade laws and policies do not adequately protect us against foreign governments which subsidize their tuna industries with unmatchable financial aids and which require substantially lower labor and regulatory costs. We are not convinced that the American consumer will be better served by foreign subsidized products which drive domestic industries out of business.

The overall value of the tuna industry to the United States in terms of providing employment, vessel construction, financial stability to insular possessions, and other economic benefits, makes a strong case for developing trade policies which protect our industry from unfair competition. We recommend that the Subcommittee consider legislative changes that would:

Ensure that all relevant U.S. policies, such as those relevant to support of the U.S. fishing industry, be taken into account in determining trade relief to U.S. industry.

Provide a method for protecting those industries which are competitive and are largely responsible for creating a particular market from import penetration assisted by foreign governments.

Reduce the cost and complexity of the trade remedy procedures.

Allow for quicker relief where injury is occurring while the remedy process is underway.

Create a presumption that protection is needed on the showing of certain minimum criteria by a domestic industry.

We urge the Committee to take the views of our industry into account in evaluating the adequacy of U.S. trade remedy laws as they are presently written.

APPENDIX I.—IMPORTS OF TUNA IN BRINE, 1980–82

Year	Thousands of pounds	Percent share of total U.S. supply of canned tuna
1980	63,107	9.5
1981	70,583	9.9
1982	87,366	…………

STATEMENT OF THE ANTI-FRICTION BEARING MANUFACTURERS ASSOCIATION

The Anti-Friction Bearing Manufacturers Association ("AFBMA") is an association of 42 companies which manufacture ball bearings, roller bearings, balls and rollers in the United States. Some are large manufacturers of a full line of bearing products; others are specialized companies which concentrate on limited lines. Together, AFBMA members manufacture more than 75 percent of all U.S.-produced ball and roller bearings, an estimated $2.8 billion in 1982. A list of AFBMA membership is attached to this Statement.

Bearings are fundamental components in all machinery comprising rotary parts, and serve to reduce friction and conserve energy. Without bearings there would be no machine tools, no rolling mills, no transportation, no elevators, no farm equipment, no printing presses. Most importantly to the United States, without bearings there would be no weapon systems, no radar, no aircraft. Thus, the U.S. bearing industry is critical to maintaining the national defense of the United States.

Imports are a major problem for the United States bearing industry, a problem which has been steadily worsening over the past decade. Notwithstanding the critical importance of the U.S. bearing industry, there has been a pattern of increased import penetration and a resulting deterioration of the U.S. industry's ability to stand ready to respond to the demands of our defense industries as well as the pervasive needs of other U.S. industries for bearings.

According to figures published by the Department of Commerce, the volume of ball bearings imported rose from 130 million in 1977 to 175 million units in 1982, despite a net decline in U.S. apparent consumption during that period. The negative impact on the U.S. industry appears to be accelerating. The volume of U.S. ball and roller bearings shipped in 1982 declined 18.8 percent from 1981. Employment fell 17.4 percent over the same period and capacity utilization fell from 70 percent to 65 percent. By 1982, imported ball bearings accounted for 56 percent of U.S. consumption and have increased their share of the U.S. market, on a unit basis, every year for the last eight years.

That increased import market share is a reflection primarily of the importers' marketing strategies to concentrate on supplying high-volume standardized bearings. In many cases, their concentration on these markets has forced U.S. producers to retreat from production of these high-volume items. For example, a size 203 ball bearing is the single most important size high-volume standard bearing, incorporated into many products, such as automobile alternators and small electric motors. In 1973, at least nine U.S. producers were offering the 203 bearing. By 1980, only one automated line in the United States still produced it. Imports have virtually usurped the market. This single example is only part of a growing threat to the health of the U.S. bearing industry.

Domestic producers have had to respond to this importer strategy by increasingly concentrating their effort on lower-volume, more technically sophisticated bearings, which cost more to develop and more to produce and, not incidentally, are often those which are most important to U.S. defense industries. The U.S. bearing industry must be assured of sufficient capital to continue to develop these more technically sophisticated bearings, and yet it has been deprived of significant sources of income by the attack of imports on its broader-based high-volume markets.

The U.S. bearing industry has taken advantage of existing trade relief laws to the extent practicable. They have monitored import levels and conducted yearly surveys of the condition of their industry to assess the possibility of availing themselves of the existing import relief laws. When that has been possible, they have taken action under the trade relief laws; the results have been of limited benefit to the U.S. industry. In 1973, the (then) Tariff Commission recommended, and the President imposed, temporary increased duties on certain ball bearings and parts under the Escape Clause. During the increased duty period, importers simply shifted their marketing strategies and made significant inroads in other bearings classifications not covered by the increased duties. And since the increased duties expired in 1978, importers from a growing list of countries have intensified their assault on the whole U.S. bearing industry.

In 1974, tapered roller bearings manufacturers filed an antidumping case involving certain tapered roller bearings imported from Japan. That case was won and dumping margins of as high as 28 percent were found but, as far as we can determine, not one cent of dumping duties was ever collected. The U.S. tapered roller bearing manufacturers continue to be hard-pressed by imported bearings. In January 1983, another antidumping petition was filed covering other types of tapered roller bearings being imported from Japan, Italy and the Federal Republic of Germany.

The AFBMA had also been active in opposing repeated Petitions to the Office of the United States Trade Representative to include bearing products on the eligible article list for the Generalized System of Preferences. The U.S. bearing industry has successfully demonstrated on numerous occasions that the bearing industry is an "import sensitive" industry, which industry, which should not be subject to an avalanche of duty-free bearings from developing countries.

But while AFBMA has conscientiously sought what aid is available under the existing trade relief laws, it has not brought trade relief cases on broader classes of bearings because of the standards for relief under those laws, the cumbersome and time-consuming procedures, the inordinate expense of filing and prosecuting a trade relief case, and their belief that even meritorious trade relief cases are often lost through inadequacies in the existing laws. The AFBMA urges both statutory and regulatory revisions of the trade relief laws and improvements in the administration of those laws to make them a more effective means of dealing with unfair trade practices by importers of foreign-produced bearings.

First, the AFBMA recommends that there be improvements in Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. Specifically, the AFBMA believes that the Congress should develop a list of essential industries or classes of essential industries which, as a result of national policy, prima facie, are deemed to be critical to the national defense. We believe that the bearing industry would, without question, be one of those industries so identified. Development of such a list would be in the interest of the United States defense effort, would simplify Section 232 investigative procedures and would reduce the burden on the domestic industry seeking relief under Section 232. Moreover, the Association believes that Section 232 ought to be amended to guarantee interested parties an opportunity to provide information and comments, and to require a public hearing at which cross-examination would be permitted.

The AFBMA also supports the proposed amendments to Section 301 of the Trade Act of 1974, as amended by the Trade Act of 1974, as amended by the Trade Agreements Act of 1979, contained in Section 4 of S. 144, which would strengthen that law and increase Congressional oversight. The Association believes that the increased authority granted to the President under that bill would substantially improve this Government's ability to deal with unjustifiable, unreasonable or unnecessary burdens or restrictions on United States international commerce and would make Section 301 a more effective tool by which the Government could deal with such practices.

Moreover, the AFBMA is particularly supportive of those provisions of S. 144 which provide for greater oversight of import practices and for "self-initiation" of Section 301 actions. Indeed, the Association believes that more extensive use of self-initiation authority, both under 301 and the other trade relief laws, would substantially reduce the burden on U.S. industries seeking remedies from unfair trade practices. As is no doubt well known to this Committee, the filing and prosecution of a Petition before the International Trade Commission or the United States Trade Representative—be it a Section 201 investigation, an antidumping or countervailing duty complaint, or a Section 301 investigation—is extremely expensive, indeed, is beyond the means of some smaller industries which are most in need of trade relief. For them, the only reasonable possibility they have of obtaining deserved trade relief would be for the Government itself to initiate and pursue investigations of unfair trade practices.

Thus, in those circumstances when the Government does initiate a trade relief investigation—an event which has occurred very rarely—that agency which requests initiation of the case should be more involved in support of that case before the investigative agency or agencies. Under current practice, although the Department of Commerce or the United States Trade Representative or the President may initiate a trade relief investigation, they do not pursue the case or present substantive evidence before the investigating agency. Notwithstanding the self-initiation process, the cost burdens are shifted to the domestic industry to pursue cases which the Government initiates. Thus, in the long run, self-initiation does not substantially reduce the costs or burdens upon a domestic industry. The AFBMA urges this committee to consider recommendations to increase the use of the self-initiation procedures available in the existing trade relief laws and to urge the Government agencies who do recommend initiation of trade relief cases to aid in presenting those cases before the investigating agencies.

Further, the Association recommends amendment of Section 232 to provide that if the Department of Commerce should determine that there exists "excessive imports" . . . "in such quantities or under such circumstances as to threaten or impair the national security," the Department should recommend to the President specific relief which would eliminate that threat. Should the President refuse to impose relief or determine to impose relief different from that recommended by the Department of Commerce, he should be required to communicate his reasons to Congress, which should have an opportunity, as it does under Section 201 of the Trade Act of 1974, to disapprove of the Presidential action and require the imposition of the relief recommended by the Department of Commerce.

Finally, the AFBMA recommends amendment of the antidumping law to make it a more credible deterrent to importers engaged in less-than-fair-value sales of imported products in the United States. As currently administered, importers, under most circumstances, do not pay any dumping duties on less-than-fair-value sales, no matter how knowingly made, until the Commerce Department enters its preliminary dumping determination and suspends liquidation i.e., the law is fundamentally prospective in application. Although the law does provide for the possibility of retroactive dumping duties to be imposed in "critical circumstances" for a period of 90 days prior to suspension of liquidation, to the best of our knowledge, retroactive duties have not been imposed. Thus, an importer which is knowingly engaged in dumping practices which are ultimately found to materially injure a domestic industry, avoids any penalty from longstanding dumping activities. Under this system, an importer is, in effect, encouraged to engage in less-than-fair-value sales until he is caught. The AFBMA believes this system does not in any way discourage less-than-fair-value sales in the U.S. market.

Therefore, AFBMA urges that the retroactivity provision of the antidumping law be extended to provide for mandatory retroactive imposition of antidumping duties for one year prior to an affirmative preliminary Department of Commerce less-than-fair-value determination. Moreover, AFBMA urges that retroactive dumping duties ought to be imposed in all cases and not merely those in which "Critical circumstances" have been found by the Department of Commerce. The threat of assured imposition of dumping duties are margins that existed prior to the filing of the case should provide a more creditable deterrent to less-than-fair-value sales.

AFBMA MEMBER COMPANIES, MARCH 1983

The Abbott Ball Company, Railroad Place, West Hartford, CT 06110.
Accurate Bushing Company, A Subsidiary of Ex-Cell-O Corp., 443 North Avenue, Garwood, NJ 07027.
Aetna Bearing Company, a Katy Industries subsidiary, 4600 W. Schubert Avenue, Chicago, IL 60639.
American Koyo Bearing Mfg. Corp., Div. of Koyo Corporation of USA, Orangeburg, SC 29115.
American Roller Bearing Company, 150 Gamma Drive, Pittsburgh, PA 15238.
The Barden Corporation, 200 Park Avenue, Danbury, CT 06810.
Brenco, Incorporated, P.O. Box 389, Petersburg, VA 23804.
C & S Ball Bearing Machinery Corp., 956 Old Colony Road, Meriden, CT 06450.
Emmco Development Corporation, 43 Belmont Drive, Somerset, NJ 08873.
Fafnir Bearing, Division of Textron, Inc., P.O. Box 1325, New Britain, CT 06050.
Fag Bearing Corporation, 118 Hamilton Avenue, Stamford, CT 06904.
Federal-Mogul Corporation, P.O. Box 1966, Detroit, MI 48235.
Frantz Manufacturing Company, Steel Ball Division, West Lincolnway, Sterling, IL 61081.
The Freeway Corporation, 9301 Allen Drive, Cleveland, OH 44125.
General Bearing Corporation, High Street, West Nyack, NY 10994.
Hartford Ball Company, Div. of Virginia Indus., Inc., 951 West Street, Rocky Hill, CT 06067.
Heim Division, Incom International, Inc., P.O. Box 430, Fairfield, CT 06430.
Hoover-NSK Bearing Company, P.O. Box 1507, Ann Arbor, MI 48106.
Hoover Universal, Inc., P.O. Box 113, Saline, MI 48176.
INA Bearing Company, Inc., 3399 Progress Drive, Bensalem, PA 19020.
Industrial Tectonics, Inc., A subs. of A. Johnson & Co., Inc., P.O. Box 1128, Ann Arbor, MI 48106.
Kaydon Corporation, 2860 McCracken Street, Muskegon, MI 49443.
Kendale Industries, Inc., 7600 Hub Parkway, Valley View, OH 44125.
Keystone Engineering Co., 1444 South San Pedro Street, Los Angeles, CA 90015.
L & S Bearing Company, P.O. Box 754, Oklahoma City, OK 73101.
Lydall, Inc./Superior Ball, 100 Wellington Street, Hartford, CT 06106.
McGill Manufacturing Co., Inc., 909 N. Lafayette Street, Valparaiso, IN 46383.
Morse Industrial Corporation, Subs. of Emerson Electric Co., 620 S. Aurora Street, Ithaca, NY 14850.
MPB Corporation, subs. of Wheelabrator-Frye, Precision Park, Kenne, NH 03431.
National Bearings Company, P.O. Box 4726, Lancaster, PA 17604.
New Hampshire Ball Bearing, Inc., Route 202, Peterborough, NH 03458.
NMB Corporation, 9730 Independence Ave., Chatsworth, CA 91311.
NN Ball & Roller, Inc., 800 Tennessee Rd., Erwin, TN 37650.
NTN Bearing Corp. of America, NTN Elgin Corporation, 1500 Holmes Road, Elgin, IL 60120.
PT Components, Inc., Link-Belt Bearing Division, P.O. Box 35, Indianapolis, IN 46206.
Rexnord, Inc., Mechanical Power Division, 4701 W. Greenfield Ave., Milwaukee, WI 53214.
Rollway Bearing Division, Lipe-Rollway Corporation, Box 4827, Syracuse, NY 13221.
SKF Industries, Inc., 1100 First Ave., King of Prussia, PA 19406.
Thomson Industries, Inc., Manhasset, NY 11030.

The Timken Company, 1835 Dueber Avenue, S.W., Canton, OH 44706.
The Torrington Company, subs. of Ingersoll-Rand Co., P.O. Box 1008, Torrington, CT 06790.
TRW Bearings Division, TRW, Inc., 402 Chandler Street, Jamestown, NY 14701.

STATEMENT OF SAMUEL B. COCO, JR., SENIOR VICE PRESIDENT, CABOT CORP.

COUNTERVAILING DUTIES ON MEXICAN PETROCHEMICALS PRODUCED FROM SUBSIDIZED PETROLEUM FEEDSTOCKS

My name is Samuel B. Coco, Jr. I am from Cottonport, Louisiana. I am Senior Vice-President of Cabot Corporation and responsible, among other things, for Cabot's Carbon Black operations.

Cabot has made Carbon Black in the U.S. for one hundred years and is the largest producer of Carbon Black in the U.S. and in the world. Carbon Black is a basic petrochemical and serves as a reinforcing agent and is an essential component of rubber for vehicle tires and other rubber products. Although Carbon Black technology was developed in the U.S. and is still most advanced here, U.S. Carbon Black producers are now threatened by imports of Carbon Black from Mexico.

Present U.S. trade law, specifically 19 U.S.C. Sections 1303(a)(1) and 1677(5), compels the Department of Commerce, through the International Trade Administration (ITA), to levy a countervailing duty against the imports of specified goods from a country to the extent such goods benefit from subsidy given by the government of that country.

Cabot Corporation, on behalf of the U.S. Carbon Black industry, has filed a Petition with the ITA which requests a countervailing duty against Carbon Black imported into the U.S. from Mexico. No injury need be shown since Mexico is not signatory to GATT or a bilateral trade agreement with the U.S.

A Preliminary Determination was issued by the ITA in that investigation on April 8, 1983. That Preliminary Determination countervailed against very minor subsidies alleged by Petitioner but said, with regards to the principal contention of Petitioner, "The existence of a price differential between export and domestic sales of petroleum feedstock and natural gas, however, does not in and of itself confer a bounty or grant on carbon black producers within Mexico." That position is similar to that of the Preliminary Determination in the investigation of Anhydrous and Aqua Ammonia from Mexico.

To place the issue in perspective, about 70 percent of the cost of production of Carbon Black is directly attributable to the cost of petroleum and natural gas feedstocks. Eighty-six percent of that amount, or almost 60 percent of total costs, is attributable to Carbon Black Feedstock, a residual oil with no commercial value except as feedstock for Carbon Black production or for blending with No. 6 Fuel Oil. The remaining 14 percent, or 10 percent of the total cost of Carbon Black production, is due to the purchase of natural gas.

There are two Mexican Carbon Black producers. One is 10 percent owned by a Mexican Government-owned financial institution, the other is 60 percent owned by the Mexican Government-owned petroleum monopoly, Pemex. Pemex is the exclusive vendor of Carbon Black Feedstock, natural gas and other petroleum products in Mexico.

The Government of Mexico, through Pemex, sets the prices for petroleum products in Mexico in accordance with economic and social policies and with little regard for maximizing the short- or long-term profits of Pemex. In the Industrial Development Plan, 1979-1982, issued by the Subsecretaria de Patrimonio y Fomento Industrial of Mexico in 1979, at page 30 (unofficial translation), Mexico declared, "This plan is complemented by an explicit policy of maintaining internal prices of energy sources for industrial use below that of the international market.* * * In contrast to other forms of protection which tend to make such costs more expensive and access to external markets more difficult, this mechanism constitutes a direct incentive to exports."

Carbon Black Feedstock is sold to Mexican Carbon Black producers for less than $2 a barrel, according to the Government of Mexico. U.S. Carbon Black producers must pay approximately $25 a barrel for Carbon Black Feedstock in world markets. Natural gas is similarly sold in Mexico at a price far below that currently available to U.S. Carbon Black producers in the U.S.

U.S. trade law defines "subsidy" as a bounty or grant which, inter alia, is the provision of goods or services at preferential rates or the assumption of any cost or expenses of manufacture, production or distribution of an exported product provided by government action to a specific enterprise or industry, or group of enterprises or industries.

It is the position of the ITA that petroleum and natural gas products in Mexico, although prices far below their export value, are not so priced for a specific enterprise or industry, or group of enterprises of industries, and such pricing is thus not a countervailable subsidy under U.S. trade law.

This position is unjustifiable generally and in the specific case of Carbon Black.

If a country makes money contributions, pursuant to a national policy, directly to one of its industries, there is no question that such act would constitute a countervailable subsidy under U.S. trade law. By renouncing export sales of petroleum products at high prices in favor of low-priced domestic sales of those same products to its industries, the same effect is achieved. The ITA seems to believe that such transfer of raw material value from government to industry is not countervailable.

In the case of Carbon Black, it should be borne in mind that there are only two Mexican direct purchasers of Carbon Black Feedstock. Hence, any low price for this product is directly and exclusively to the benefit of this industry alone.

Pemex has not been willing to sell Carbon Black Feedstock to foreign purchasers. Certainly Carbon Black Freedstock has never been, and is not now, available to foreign purchasers at domestic Mexican prices, even if the foreign purchaser is willing to pay the export tax on that product so it can be shipped abroad.

Generally, Mexico has priced consumer petroleum products relatively higher than industrial petroleum products so as to suppress consumer demand and induce industrial use. For example, the relative price of gasoline to No. 6 Fuel Oil in the U.S. is 2 to 1. In Mexico, it is 17 to 1. This is a selective subsidy to a group of industries, e.g. those using petrochemical feedstocks or requiring heavy energy use in production.

It should be noted that the U.S. has sought to maintain low domestic petroleum and natural gas prices from time to time by controlling the price of oil and natural gas. Mexico simply has its government-owned petroleum monopoly charge low prices. Both practices have resulted at times in below world-market prices for petroleum products, and incriticism from trading partners. These practices are, nonetheless, readily distinguishable.

Price controls do not constitute a subsidy. The buyer of a raw material subject to local price controls has an enhanced profit potential if it can sell its product at world prices. In essence, this profit potential has been transferred from one private party (the supplier) to another private party (the buyer) as the more or less incidental by-product of national policy.

Preferential pricing by government oil monopolies does constitute a subsidy because the government is the raw material supplier as well as the national policy maker. It possesses the export profit potential which it transfers to the local producer.

The transfer of value from a government to a private producer is a subsidy. The reallocation of value among private buyers and sellers is not.

A national oil monopoly which so subsidizes local industry can avoid creating a countervailable subsidy by:

(1) Selling the raw material to all comers, whether domestic or foreign, at the subsidized price, as happens automatically under a price control mechanism;

(2) Charging each local producer world prices for that fraction of its raw material used to produce goods for export, as is done in Colombia and other countries, thus avoiding exporting the subsidy.

Mexico's failure to implement either of the above practices confirms Mexico's own statement that it intends its subsidy to have a direct effect on exports.

The U.S. trade laws, as interpreted by the ITA, permit foreign governments, through their state petroleum monopolies, to subsidize their petrochemical and high-energy component products for export to the U.S. without being subject to a countervailing duty. The U.S. petrochemical industry cannot overcome this unfair competitive advantage through any conceivable efficiencies or technological advances. The U.S. petrochemical industry, including the Carbon Black industry, now stands beleagured by subsidized imported products, as the attached report of the International Trade Commission demonstrates.

The Government of Mexico refers to its practices as a direct incentive to exports. Those practices are indistinguishable from direct subsidies in their consequences. Only the ITA refuses to deem these practices subsidies.

If the ITA has erroneously interpreted the U.S. trade laws, it should be so advised and its practices should be brought in line with the law. If it has not, these trade laws should be modified to correct this inconsistency, to preserve fair competition and to provide equitable treatment to the critical U.S. petrochemical industry.

Thank you for the opportunity of presenting my views to your committee. I look forward to your review of, and remedial action concerning, a condition that is intolerable, unfair and contrary to the interests of the United States and its people.

STATEMENT OF MICHAEL HALL, RANU BASU, AND JERRY SIMONELLI, COUNSELS TO THE FAIR TRADE SUBCOMMITTEE OF THE INTERNATIONAL TRADE COMMITTEE, CAST METALS FEDERATION

This statement is submitted by counsel, on behalf of the Fair Trade Subcommittee of the International Trade Committee of CMF (Cast Metals Federation). The domestic foundry industry has been severely impacted by subsidized and dumped imports during recent years. The ability of the industry to counter these and other unfair trade practices is impaired by several weaknesses in current statutes dealing with these practices. The competitive position of domestic manufacturers is further weakened by the ineffectiveness of the Customs Bureau's enforcement of laws and regulations dealing with importation and marking of imported goods. The procedures connected with import relief actions such as anti-dumping and countervailing duty actions, section 201 actions and section 406 actions are additional sources of weakness in the existing trade law. Detailed comments with regard to these problems follow.

(1) Imports from non-market economy countries: Imports of castings from non-market economy countries, especially the People's Republic of China (PRC), have increased rapidly in the last year, and pose a great threat to the domestic industry. These products are priced at levels which cannot reflect the true cost of production of such castings. Economists report that even by internal PRC pricing standards, China sells export products at a loss. The PRC is able to do this because of the centrally controlled economy, selecting products which will be paid for export at a loss in order to further political, economic, and financial goals of the country.

During the last several years, there have been efforts to weaken the statutory protection given in cases involving dumping of products by non-market economy countries. These efforts have been directed at weakening the test for sales at "less than fair value". Such a weakening would do a great disservice to American industry. If anything, the statutory test should be strengthened to allow a more accurate determination of the cost of production in the exporting country, taking into account true costs of labor, materials, facilities, etc., as well as actual currency exchange value rather than controlled exchange rates. In this connection, the procedure for choosing a "surrogate" non-state controlled economy country in order to determine foreign market values of imports from non-market economy (NME) countries should be strengthened.

2. Relief for manufacturers of components: A serious difficulty for domestic industry is the importation of completed products for which U.S. manufacturers are suppliers of components. Even though these completed products may be dumped or subsidized, thereby injuring the producers of components, under current law manufacturers of components have no access to the unfair trade remedies. Legislative changes are essential to provide access to these remedies for all domestic industries affected by unfair imports.

3. Distortion of currency exchange rates: Lack of currency parity provides foreign suppliers with substantial price advantages; current estimates are that the artificially low valuation of the yen provides Japan with a price advantage of more than 30 percent and the European countries enjoy a 20-25 percent price advantage due to their undervalued currencies. Current trade remedy law provides little relief from these pricing disparities, which tend to distort all trade as well as negating productivity increases by domestic industry. Methods must be provided for domestic manufacturers to secure relief from unfairly priced imports resulting from distortions of currency exchange rates.

4. Implementation of various unfair trade remedies by U.S. government agencies: The prompt and proper implementation of the various remedies against unfair trade practices provided for by the existing U.S. trade laws is essential for maintaining the competitiveness of domestic manufacturers in the arena of international trade. However, specific aspects of these trade remedy laws require immediate attention. For example, during the conduct of countervailing and antidumping duty actions there should be more opportunity provided to the petitioners and their counsel to participate in the process of verification of the data provided by foreign governments. In connection with Actions under sections 201, 337, and 406, executive branch discretion to alter ITC recommendations should be strictly limited and altogether eliminated in the case of unanimous ITC decision. This would clearly be in

keeping with the intent demonstrated throughout the legislative histories of the Trade Act of 1974 and the Trade Agreements Act of 1979. In particular, section 406, which was put in the Trade Act of 1974 to meet the difficulties involved in calculating dumping margins when dealing with socialist country exporters, has been rendered virtually ineffective by the presidential override mechanism.

5. Enforcement of import-related laws and regulations by U.S. Customs: There are several import-related matters which fall within the scope of U.S. Customs authority, such as enforcement of country of origin marking requirements for imported goods, supervision of special duty exemptions and preferences, as well as various types of import restrictions and the implementation of statutorily imposed penalties and other enforcement provisions. In almost all these areas there is a need for both better guidelines and speed in the processing of petitions and cases. For example, for the domestic manufacturer facing the problem of unfairly imported products such as improperly marked or even unmarked imports, the problem is enhanced by the difficulties involved in the gathering and presentation of supporting evidence, as well as by delays and lack of response of Customs. These and various other difficulties inherent in the process of dealing with unfair trade practices demand prompt relief which is very rarely forthcoming.

6. Downstream dumping: Downstream dumping or dumping at a remote stage of manufacture and/or exportation is a very real problem facing U.S. manufacturers. However, while sales of foreign imports at less than fair value (LTFV) are covered by existing trade remedy laws, downstream dumping falls outside the scope of such legal remedies. In fact, downstream dumping can be utilized to evade an existing antidumping duty order. This major loophole in the system of protecting domestic manufacturers from unfair trade practices should be closed in order to ensure fair trade.

Statement of Mark Roy Sandstrom, Esq., Counsel, on Behalf of the Committee on Pipe and Tube Imports

COMMENTS ON TRADE REMEDY LAWS

Mr. Chairman and Members of the House Ways and Means Subcommittee on Trade. I am grateful for this opportunity to present testimony on behalf of the Committee on Pipe and Tube Imports (CPTI) concerning the trade remedy laws in general and their effect on the U.S. steel pipe and tube producers in particular. The Committee on Pipe and Tube Imports is an association of nine major domestic pipe and tube manufacturers, located throughout the United States. There are 125 manufacturers of welded pipe and tubing in the United States. Generally speaking, these firms are highly efficient, profitable operations which are being seriously injured by our government's inability or unwillingness to enforce U.S. trade laws and international agreements.

In our present economic scenario, where demand for CPTI's products is low and there is an excess capacity of steel due to worldwide recession, the pipe and tube industry is particularly threatened by unfair trading practices. Foreign producers are able to sell to their regular customers in their home market at high protected prices, but demand will not be high enough at home to keep their inventories turning over. The foreign producer's production capacity is so large—well in excess of the needs of their domestic markets—that a large portion of their production is destined for export markets, primarily the United States. They prefer to turnover excess inventory at prices below the actual cost of production rather than pay the economic costs as well as the social cost of unemployment associated with excess capacity and high inventories.

It is a common fact, acknowledged by all, that U.S. markets are more open to foreign sellers than vice versa. Naturally, when price discrimination or dumping does occur in the international marketplace, it is more likely to happen in this country because there is more opportunity for foreign producers to dump in an open market environment. Additionally, even though dumping is unlawful in the United States, the federal government does not vigorously prosecute foreign companies that engage in price discrimination. Those that are caught are not penalized. It is a low-risk proposition for our trading partners.

CPTI believes that the U.S. government must prosecute foreign companies that engage in price discrimination as vigorously as U.S. companies are prosecuted under the antitrust statutes. The U.S. government has no qualms about self-initiating and enforcing antitrust proceedings against U.S. companies employing unfair pricing practices, but the government will not undertake the same initiative when a foreign company manipulates prices. Even though the law presently allows the government to commence investigations and to prosecute violations including dumping and countervailing duties, the agencies charged with that responsibility (the Commerce Department and the International Trade Commission) have seldom initiated cases on their own. The burden of initiation is placed on private domestic companies. CPTI believes that the government has the responsibility not only to enact laws but to enforce them as well.

Under the U.S. government's current method of enforcing the trade remedy laws, it is not enough for an American firm to write a letter to the Commerce Department indicating the firm's reasons for suspecting violations under the trade laws. In order to obtain any kind of relief from unfair trading practices, the firm must conduct investigations and assemble evidence itself before the government will conduct their investigations. As any domestic manufacturer can attest, bringing a trade relief action under the current laws is a very costly proposition. It is not within the means of most small and medium sized manufacturers.

In order for the pipe and tube industry to obtain equal representation under U.S. trade laws, the industry must assemble a coalition of firms that normally compete against one another. With inadequate staff resources and inadequate budgets to devote to costly legal representation, we can find no other way to obtain relief from injurious, unlawful trade practices. The only other option remaining for U.S. pipe and tube manufacturers is to decide to do nothing—allowing unfairly traded products to further erode our markets and profits and face eventual bankruptcy.

CPTI does not believe that our trade laws were meant to discriminate against the small, yet highly efficient and profitable firms in the United States which are vulnerable to dumping and foreign subsidization. Again, the U.S. government must exercise the authority granted under the trade laws to self-initiate investigations and to vigorously prosecute suspected offenders.

CPTI strongly supports and urges the Committee to consider a legislated Trigger Price Mechanism (TPM) program to protect the small U.S. manufacturers who cannot afford equal representation under the U.S. laws. In fact, the Commerce Department did resume the TPM program last year to monitor imports of stainless steel round wire and nails. We firmly believe that the same treatment is justified for welded carbon steel tubular products.

Although there were a number of valid criticisms of the TPM program as it was administered by the Treasury and Commerce Departments, the fact is that the TPM program worked very well for steel pipe and tube producers because it kept prices at reasonable levels and market share remained fairly constant. When the TPM was suspended in January, 1982 in response to major antidumping and countervailing duty petitions failed by large integrated U.S. producers of welded tubular products did not participate in those cases, and none of those cases related to tubular goods of any kind. However, the trigger prices for our products were also abandoned by the government. Since that time, our industry has experienced a sharp decline in prices from foreign competitors, to levels well below the last trigger prices, and a simultaneous surge in the level of import penetration. These phenomena coincide with a dramatic decline in domestic consumption due to current economic conditions. The results have been disastrous for pipe and tube producers in this country.

Another aspect of the trade remedy laws that must be addressed by the Committee is concerning the form of relief currently authorized under existing statutes. Firstly, the relief does not distinguish between U.S. competitors, meaning that even though one company invests a great deal of resources into bringing an antidumping or countervailing duty petition, all competitors in the same industry are relieved of the injurious foreign trade practice. The law would be more equitable by providing for expenses in successful cases to at least cover the cost of legal fees incurred. This penalty could be collected as a surcharge on the dumping duty.

Secondly, the relief is only prospective. Because the foreign firm is not required to compensate domestic companies for injury suffered for the past violation and no penalties are assessed, the foreign firm is only required to cease the unlawful trading practice and the case is settled. This practice is unfair to the domestic producer and is not an adequate deterrent to persistent violators.

Under Section 704 of the Trade Agreements Act of 1979, the Congress gave the Commerce Department discretionary powers to negotiate suspension agreements with foreign companies and foreign governments. The purpose of this section was to insure that the unfair trade practices would be halted in a more cost-effective manner than through collection of countervailing duties by the Customs Service and annual administative reviews by the Department. The Report of the House Ways and Means Committee on the Act stated, "The authority to suspend investigations pursuant to the Section is discretionary and subject to the overriding requirement that suspension is in the public interest." (House Report 96-317), p. 55). CPTI believes that the failure of Commerce to provide for the monitoring of prices in connection with suspension agreements defies the intent of Congress to insure that foreign exporters will not violate the unfair trade laws of the United States and does not meet the statutory requirement of the Act.

It is clear that the intention of the countervailing duty laws is to insure that the prices of imported products represent the fair market production costs of those goods. Production subsidies or export subsidies granted to a foreign manufacturer allow that manufacturer to dispose of its goods at prices which do not represent true production costs. Prior to 1979, if such subsidies were found, countervailing duties were imposed to obviate the harm such subsidies would have on domestic producers. The same goal of making the imported good reflect its cost of production is sought to be achieved more efficiently and effectively under the Act. Therefore, the renunciation of subsidies under suspension agreements should have an effect on the pricing of the products in the marketplace.

In short, it is incumbent upon the Commerce Department to monitor pricing information after the suspension of a countervailing duty investigation. A provision can be added to suspension agreements stating that Commerce will monitor prices. If the foreign producers do not raise the price of the transported products by an amount equivalent to the subsidies found to exist, the Department must either rule that the suspension agreement has been violated or self-initiate a dumping investigation. Only in this way will Commerce be able to properly exercise the authority vested in it by Congress and to conform to the Congressional mandate entering into suspension agreements only when the agreement is in the public interest.

The third point regarding the issue of relief is considering that only prospective relief is granted, the process takes too long. While cases are pending, the violations may increase substantially. The investigations must be concluded much faster, providing more certain remedy.

The last problem I would like to address has been labeled "downstream dumping." This phenomenon occurs when the U.S. government, responding to cases filed under the U.S. trade laws, stops the dumping of certain raw materials in the U.S. market. The foreign company simply turns around and converts the raw materials into the next level of product and dumps it in the domestic market. What occurs is that one segment of an industry is relieved of the injurious trading practice at the expense of another segment of the industry which becomes an immediate victim.

This problem exists, as an example, between raw steel and pipe and tube products. When raw steel is dumped in the U.S. market, independent pipe and tube producers benefit from the low priced products. The carbon steel producers then file cases which eventually cut off the cheap supply of raw steel or forces prices up. The foreign producers then start dumping cheap tubular products in the U.S. market. This has actually happened to our industry. U.S. laws must be revised to immediately provide relief down the manufacturing line when the government accepts or initiates a case.

A summary of the points CPTI would like the Trade Subcommittee to consider follows:

The U.S. Government must prosecute foreign companies that engage in price discrimination as vigorously as U.S. companies are prosecuted under the antitrust statutes.

The Department of Commerce must self-initiate investigations when evidence exists of violations under U.S. trade laws.

The Trigger Price Mechanism should be reinstated for pipe and tube products and enforcement measures improved.

Some form of relief should be awarded to domestic companies to compensate for injury suffered as well as to deter persistent violators.

The U.S. Government's policy regarding Suspension Agreements is clearly not in line with Congress intention and the policy must be revised.

The process defined under the trade laws must be shortened, providing more certain remedy.

Recognizing the "downstream dumping" phenomenon, U.S. laws must be revised to provide relief down the manufacturing line when the government accepts or initiates a case.

CPTI stands ready to assist the Committee by providing further information or drafting legislative language regarding any of the preceding issues. We appreciate the opportunity to participate in the Committee's ambitious undertaking.

Thank you.

STATEMENT OF JOHN M. HIMMELBERG, ON BEHALF OF THE FLORIDA FRUIT & VEGETABLE ASSOCIATION

The Florida Fruit and Vegetable Association (FFVA or The Association) is a nonprofit agricultural trade association whose members produce a substantial volume of the fruits and vegetables grown in Florida. The Association has presented testimony to this Subcommittee on many occasions in the past and appreciates the opportunity to do so again.

The Association has long espoused the position that international trade must be free and efforts to accomplish that goal should be encouraged. However, the reality of the situation is that international trade is not free. Trade remedy laws acknowledge this fact and are a deliberate attempt to render free trade fair.

The trade remedy laws under consideration by the Subcommittee are the only means available for redress of specific economic grievances by U.S. producers. Broader remedies such as bilateral agreements and GATT negotiations can achieve more significant and longer lasting results to rectify trading inequities and Congress should encourage such approaches both as a means for improving trade relationships but also creating better dispute settlement procedures.

As a general proposition, the trade remedy laws are the last defense in correcting or attempting to correct unfair trade practices. Because of their complexity, it can be, and often is, forbidding to small businesses to seek such relief. And, because of the mixed history of achieving results supporting U.S. industry, many believe that pursuing such remedies are simply not worth the cost. Whether true or not such perceptions must be dispelled.

In any discussion of trade policy or remedies it is important to consider American agricuture. U.S. farmers will gladly challenge farmers around the world in the competitive market place. U.S. farmers are the paradigm of efficiency, so much so that historically agriculture has been the principal bright spot in the U.S. balance of trade picture. However, even in agriculture, free trade in the world does not exist. It does not exist for our trading partners who restrict imports of U.S. agricultural products or subsidize their agricultural products to the United States. And, significantly, our country has recognized the need to set up limited protection for certain U.S. commodities.

In this context, the Subcommittee raises the appropriate question, viz., are our trade remedies sufficient? The short answer is: apparently not. Over the last few years (and even before) there has been an increasing demand for Congress to enact some type of reciprocity legislation. And, with domestic content legislation pending before this Congress, the mood suggests a turn to the right of our trading policy toward protectionism. These proposed solutions are responding to legitimate claims of injury or unfair trade practices. The Association is sympathetic to the need for trade policy to address these claims. In particular, improvements in trade remedies are needed to address claims for relief by U.S. producers quickly and efficiently.

The Association's connection with the anti-dumping petition filed in 1978 by several Florida agricultural groups and which is still pending before the U.S. Court of International Trade is a prime example of the maxim, "Justice delayed is justice denied," and is symptomatic of what is wrong with trade remedies.

Simpler rules with clearer standards (e.g., market disruption) with less of a burden put on the claimant to make a prima facie a case of dumping or unfair trade practice should be established. In addition, because the Government has the expertise and resources, it should bear more of the burden for investigating the case. Moreover, precisely because of the Government's expertise, the Association believes a country-by-country analysis of the trade practices between U.S. and its trading practices should be conducted.

In order to place the trade remedy laws in perspective, it is well to remember the stated purposes of the Trade Act of 1974 which are:

To foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade: to establish fairness and equity in international trading relations;

To harmonize, reduce and eliminate barriers to trade on a basis which assures substantially equivalent competitive opportunities for commerce of the United States; and

To provide adequate procedures to safeguard American industry and labor against unfair and injurious import competition.

When weighed against the foregoing standards, it is clear that U.S. trade policy including trade remedies have been found wanting. If this is true, then the question to be asked is how effective are the present trade remedies. We believe the trade remedy laws are essential to protect legitimate U.S. interests and efforts to streamline the procedures, insure quick and certain results, are to be encouraged. The challenge to respond quickly and effectively to claims of unfair trade practices must be met.

The Tokyo round of multi-lateral trade negotiations (MTN), the passage by Congress of the Trade Agreements Act of 1979 and the continuing reorganization of governmental trade responsibilities have all been heralded as the answer to U.S. trade problems. However, such problems, although acknowledged, still persist despite our best efforts. We suggest the principal reason is because our trading partners are, in many cases, in an advantageous position vis-a-vis U.S. producers and, therefore, it is not in their economic interests to alter the status quo. But it is this situation which must be dealt with head-on.

Unified action by the Executive Branch is needed to address both imports causing injury and to support exports of domestic industries. In many cases, the government is paralyzed because so many agencies are necessary to comment on the particular action before it.

With regard to anti-dumping, countervailing duty and similar type actions, problems arise with regard to definitions, e.g., material injury and fair value, which can undermine a legitimate case. In addition, where a number of complaints have been made indicating problems with a particular country or group of countries, (e.g., winter vegetables from Mexico, certain goods in Japan or the European Economic Community) the Government can and should initiate an investigation.

We believe the Subcommittee should urge the Government to act on its own in an attempt to rectify an unfair trading situation before a company or industry is adversely affected. Concomitant with this responsibility is the responsibility to compile country by country all governmental and private sector barriers to entry and unfair trading practices. Again, this points up the necessity of having all trading matters under one roof in the Government.

It is clear that many of our trading partners continue to deny or hinder market access to U.S. goods and services while at the same time our country grants free, or at least greater access to, products from these same countries. Specific trade remedy laws do not deal effectively with such problems. Until these problems are addressed, continued pressure for reciprocity and protectionist legislation will be exerted.

FFVA is concerned with international trade agreements, both multinational and bilateral, that promote free trade especially for perishable agricultural commodities. To that end, the Association suggests termination of Title Five of the trade Act of 1974 concerning the Generalized System of Preferences for at least five years primarily because benefits gained under the GSP have not outweighed its detriments.

Administration of the present trade remedy laws is too complex, costly, and time consuming for all parties, thereby seriously undermining its effectiveness.

Even though the President has broad discretion in remedying unfair trade practices, the Association suggests the Subcommittee consider new legislation mandating a quick response by the Executive Branch to seek reciprocal action for unfair trade practices against U.S. producers.

Lastly, the Subcommittee should consider urging the Executive Branch to enter into meaningful bilateral negotiations with our closest trading partners. Specifically, emphasis should be placed on insisting that Mexico become a signatory to GATT not only so that it might share its benefits but also to make it easier to resolve trading disputes with Mexico.

In addition, the Association is concerned that the trade remedy laws cannot adequately deal with claims of unfair trade practices in the perishable agricultural commodity area. We think this has been clearly documented by the antidumping case for winter vegetables and we urge special consideration be given to this issue.

Mr. Chairman, we urge you to reject the move toward protectionism and we congratulate you on your efforts to improve the effectiveness of the trade remedy laws. We ask that you give consideration to the special problems of the perishable agricultural commodity industries and assure them the same protection and market access, especially in Mexico and Canada, that their trading partners enjoy in the United States.

Squire, Sanders & Dempsey,
Washington, D.C., May 13, 1983.

Hon. **Sam M. Gibbons,**
Chairman, Subcommittee on Trade, Washington, D.C.

Dear Mr. Chairman: Recent Department of Commerce preliminary determinations in countervailing duty cases involving foreign government subsidization of domestic industries by providing raw materials or other production components at artifically low cost suggest that, as interpreted by the Department, our existing countervailing duty provisions may not address this form of subsidization with enough specificity to assure that affected U.S. industries can obtain relief from such practices. On behalf of a coalition of U.S. cement producers and workers seriously harmed by rapidly increasing imports of Mexican cement that benefit from a massive government-provided energy subsidy,[1] we urge early enactment of legislation to make it clear beyond any dispute that our law requires countervailing action in response to such subsidies.

We request that this provision be included in any package of trade remedy reforms recommended by the Trade Subcommittee.

Before turning to our specific proposal, it may be helpful to provide an illustration of the problem that gives rise to the need for legislation.

PENETRATION OF U.S. MARKETS BY SUBSIDIZED MEXICAN CEMENT

In recent months, there has been a rapid influx of Mexican cement and cement clinker into the Southwest and Gulf States, at very low prices. Mexican firms of affiliates have acquired ready-mix concrete dealers and distribution facilities in Arizona and an import terminal in Florida; they are reported to have applied for special rail rates to ship massive quantities of cement into Texas; and their salesmen and trucks are pouring into U.S. cement markets in California and elsewhere.

This rapid penetration of U.S. cement markets comes when U.S. producers cannot afford to lose any market share to subsidized foreign competitors. Cement markets in this country are severely depressed, due to very low levels of construction activity. Nationally, U.S. producers are operating at only 65 percent of capacity. Employment, sales and profits are generally at low levels, and several firms have suffered losses. In the California-Nevada cement market, the industry has been further battered by imports from Australia and Japan that the Commerce Department has preliminarily found to be sold at less than fair value, by margins as large as 136 percent. The subsidized and dumped imports are depriving the U.S. industry of cash flow that is needed to pay for new plants and facilities and to complete further modernization.

The United States cement industry has made major investments in new technology production facilities, in order to achieve maximum energy efficiency and scale economies, and consequent cost savings. Energy efficiency is important, because the manufacture of cement essentially consists of the conversion of hard rock into a fine power of different chemical composition, through the use of energy. In the United States and most other countries, the cost of energy accounts for roughly 50 percent of direct manufacturing costs, and approximately 35 cents of every cement sales dollar.

The foreign plants responsible for the rapid influx of Mexican cement into U.S. markets are modern and efficient, but generally no more modern or efficient than U.S. plants. Mexican producers are able to ship cement to the United States and compete in U.S. markets with very low prices solely because of the subsidies they receive from the Mexican Government.

MEXICAN SUBSIDY PROGRAMS

Cement industry development

Since 1976, the Mexican Government has targeted its cement industry for intensive development. The Government's Industrial Development Plan designates cement manufacturing as a priority industry, entitled to a series of development incentives. In addition, the Mexican Government and producers jointly have developed and implemented specific cement industry plans calling for massive expansion of Mexico's cement production capacity. An express purpose of these plans is the creation of excess production for export. The five-year cement industry development plan covering the period 1977–1982 specified an increase in annual cement production of eight million tons, two million tons of which were for export. A more ambitious plan promulgated in 1980 called for an increase in annual production from 19.8 million tons to 35.1 million tons in the period 1980-83, with ten percent of the projected capacity (3.5 million tons) for export. Pursuant to these plans, several very large, new or expanded plants have been built near the U.S.-Mexican border or adjacent to ports, facilitating exports to the United States.

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[1] Members of the coalition include General Portland, Inc.; Gifford-Hill & Co., Inc.; Kaiser Cement Corp.; Monolith Portland Cement Co.; and the United Cement, Lime, Gypsum & Allied Workers International Union, AFL–CIO, CLC.

Fuel subsidy

Tax credits and other government subsidies have provided capital needed for this aggressive Mexican cement industry expansion program. The largest subsidy, however, is provided by the Mexican Government through the artificially low pricing of the single most important cement production ingredient—energy. Through its wholly-owned oil and gas monopoly, Petroleos Mexicanos (PEMEX), the Government of Mexico provides heavy fuel oil to its domestic cement industry at less than 1/20th of the world price (in February 1983, $1.23/barrel versus the $27.30/barrel price at which Mexico sold the same oil for export). Although purportedly available to all Mexican domestic users of industrial fuel oil, this subsidy is effectively targeted on the cement industry and a few other highly energy-intensive industries. It cuts Mexican cement producers' manufacturing costs virtually in half, giving them a competitive advantage no United States producer, no matter how efficient, can overcome.

APPLICATION OF COUNTERVAILING MEASURES

The gross distortion of trade caused by the Mexican Government's cement industry programs and fuel subsidy requires a governmental response by the United States, which regulates entry into U.S. markets by counterbalancing the effects of the Mexican Government's actions. That is the function of our countervailing duty provisions, whose purpose is: "the prevention of unequal competition in our domestic market with products of other countries which give to their manufacturers some special advantage." *ASG Industries, Inc.* v. *United States,* 467 F. Supp. 1200, 1223 (Cust. Ct. 1979), citing *Nicholas* v. *United States,* 249 U.S. 34, 39 (1919).

Representatives of the domestic cement industry—General Portland, Inc. Gifford-Hill Cement Company, Kaiser Cement Corporation, Monolith Portland Cement Company, and the United Cement, Lime, Gypsum and Allied Workers International Union, AFL/CIO, CLC—have petitioned for relief under those provisions. It is not certain, however, that relief will be forthcoming, at least not without possibly lengthy litigation.

In a recent case involving Mexican fuel subsidies for the production of carbon black, the Commerce Department preliminarily determined that no countervailable subsidy is provided, because the low-priced natural gas and carbon black feedstock provided to carbon black producers by the Mexican Government through PEMEX is made available to other Mexican domestic industrial users at the same subsidized price. The Department took the preliminary position that because the fuel was generally available to Mexican producers at the same artificial price, its pricing did not confer a countervailable subsidy under United States law. The Department took a similar position in a case involving Mexican ammonia.

The approach to the fuel subsidies adopted in these determinations frustrates the purposes of the countervailing duty law. It ignores the fact that, by means of this purportedly generally available subsidy, the Mexican Government is effectively relieving highly energy-intensive industries of a very large element of their production costs, thus differentially benefiting those industries and distorting trade in their products. And it is doing so with its eyes wide open. The Mexican Government's Development Program for the Cement Industry expressly states that "the manufacture of cement is an excellent option for the increased value conversion of energy sources."

The Commerce Department's restrictive interpretation of its statutory mandate in the *Carbon Black* and *Ammonia* cases leads to the anomalous result that the more widespread a foreign government's subsidy program, and thus the greater its impact and trade distorting effect, the less likely it is to be regarded by the Commerce Department as a countervailable subsidy. This is not rational policy, nor one that is mandated by law or any international obligation of the United States.

PROPOSED AMENDMENT

It is beyond the power of the United States Government—even if it were otherwise desirable—to equalize conditions of competition among United States industries and all of their present and potential foreign competitors. It is, however, within our government's power—and one of its obligations in prescribing the terms upon which foreign products may enter U.S. domestic markets—to counterbalance the interferring hands of foreign governments. The case we have outlined unquestionably involves a foreign government subsidy that confers direct and massive benefits on its national producers, giving their products an artificial competitive advantage over American-made products—precisely what the countervailing duty laws are intended to redress.

However, the Commerce Department's recent preliminary determinations hold that the current statutory provisions are inadequate to deal with this kind of subsidy. We believe that this interpretation is in error. More importantly for this body, this interpretation is bad policy that is damaging to the United States, because it allows foreign governments freely to distort conditions of competition in U.S. markets, to the detriment of U.S. industries and workers. We submit, therefore, that the issue is of such importance that the Congress should address it now, and clarify the Department's mandate by amending the statute.

Such an amendment should expressly provide for imposition of a countervailing duty to offset a subsidy consisting of the provision by a foreign government of a raw material or other production component such as energy at an artificial value that is less than the material or component's reasonable market value. Reasonable market value should be determined by reference to the prices at which the material or production component concerned is sold in open world markets by non-state-owned producers, under conditions of free competition. The amendment should also specify that such a subsidy is to be countervailed without regard to whether it is made widely or narrowly available by the foreign government to its national industries.

CONCLUSION

Public support for free trade policies is eroded whenever it appears that those policies are allowing this country to be victimized by unfair, anticompetitive practices of foreign governments and industries. The foreign government energy subsidization that is distorting competition in U.S. cement markets, and injuring the U.S. cement industry, is such a practice. It is a practice that represents a growing form of unfair trade. The United States' countervailing duty law therefore must be capable of dealing effectively with it. We urge the Congress to act promptly to assure that it is.

We respectfully request that this letter be incorporated in the record of the recently concluded hearings regarding options to improve the trade remedy laws.

Sincerely yours,

RITCHIE T. THOMAS.

STATEMENT OF JOHN F. MCDERMID, INTERNATIONAL BUSINESS-GOVERNMENT COUNSELLORS, INC.

EXECUTIVE SUMMARY

1. Import relief under Section 201 of the Trade Act of 1974 (the "escape clause") has frequently been unavailable to U.S. industries for two reasons: (1) the difficulty in proving that increased imports are the reason for industry losses, and (2) to Presidential reluctance to fully adopt International Trade Commission relief recommendations.

2. Contrary to the general assumption, it appears that U.S. industries would likely find it more difficult to obtain import relief under Article XIX of the General Agreement on Tariffs and Trade (GATT)—when literally interpreted—than under Section 201.

3. However, this conclusion must be placed in perspective since GATT Article XIX is widely circumvented and disregarded by GATT Signatories, with the exception on the U.S., Canada, and Australia.

4. In reforming Section 201, Congress should carefully consider:

(1) The implications, if any, of reform on this country's GATT obligations;

(2) The impact on various public and commercial U.S. interests of a relaxation in the "causation" requirement between increased imports and serious injury;

(3) Requiring that, before the ITC determines the nature of import relief, a joint and integrated business, labor and government plan is agreed upon such that the petitioning U.S. industry will actually be capable of adjusting to international competitive conditions; and

(4) Introducing additional criteria to guide the President in his assessment of policy issues.

I. Introduction

My name is John F. McDermid and I am Vice President and General Counsel for International Business-Government Counsellors, Inc. (IBGC), a private international government relations counselling firm with headquarters in Washington, D.C.

My previous experience includes: Attorney-Adviser, U.S. International Trade Commission (ITC); Attorney, Bureau of Competition, Federal Trade Commission (FTC); and Assistant General Counsel (for antitrust and international trade), National Association of Manufacturers. While at the ITC and FTC, my responsibilities included review of Section 201 proceedings.

The purpose of this statement is to provide the Subcommittee (1) some historical perspective of section 201 of the Trade Act of 1974, the "escape clause", (2) highlights of the major criticisms the business community has raised with the statute and its enforcement, (3) a comparison of Section 201 with its GATT counterpart, Article XIX, and (4) comments and recommendations regarding possible reform of the law.

The views and analysis expressed in this statement are mine and do not necessarily reflect those of IBGC or its clients.

II. Escape clause—an overview

Historical perspective

With the passage of the Trade Agreements Act of 1934, a new Congress and Administration sought to reverse the highly protectionist Smoot-Hawley legislation by opening-up trade. The Act authorized the President to negotiate with other countries for a reciprocal lowering of tariffs and other barriers. However, the price to be paid for freeing trade was increased imports that threatened certain import-sensitive U.S. industries.

Recognizing this threat, President Roosevelt's trade negotiators agreed to an "escape clause" in the 1942 bilateral trade agreement with Mexico by permitting a withdrawal of concessions if a domestic industry would be seriously injured. The escape clause first became part of U.S. trade law through passage of the Trade Agreements Extension Act of 1951. It was later revised in the Trade Expansion Act of 1962 and the Trade Act of 1974.

III. Section 201 of the Trade Act of 1974—description

Since its inception, the "escape clause" was designed to provide domestic industries temporary relief during which time they could adjust to import competition. The rationale for the law is that as barriers to international trade are lowered, some industries and workers face serious injury, dislocation or perhaps extinction.

A. ITC role

For relief to be granted a domestic industry, the International Trade Commission (ITC) must be petitioned by an industry or other concern (e.g. trade association, union). An investigation may also be requested by the Office of the U.S. Trade Representative (USTR), or upon a resolution of either the House Ways and Means Committee or the Senate Finance Committee. The petition must include a statement describing the specific purpose for which import relief is sought, which may include facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition. The ITC reviews the petition, holds public hearings and within 6 months determines whether the industry has been injured by imports. The ITC's injury findings and suggested import relief are submitted to the President for review and action.

In order to recommend import relief, the ITC must find that:

(1) Imports are increasing, either actually or relative to domestic production and the domestic producer's proportion of the market had declined;

(2) A domestic industry competing with the imported article is being seriously injured or threatened with such injury; and

(3) The causation requirement has been met; i.e. increased imports must be found to be a "substantial cause" of a serious injury or threat thereof to the domestic industry.

The 1974 Act defines "substantial cause" as one which is important and not less than any other cause". This has been interpreted to mean: (a) if any cause of injury is found to be greater than that of increased imports there is no basis for relief; (b) if increased imports are one of several equal causes of injury, relief may be granted but only if imports are found to be an "important" cause of injury. Thus, it is unlikely that imports will be considered "important" if they are one of many equal causes of injury. On the other hand, if they are one of two or three equal causes of injury, they may be deemed important.

When the increased imports, injury and causation criteria are met, the ITC may recommend: (1) increased tariffs, (2) quotas, (3) a combination tariff and quota, (4) trade adjustment assistance, or (5) any combination of these options.

B. Presidential role

If serious injury is not found by the Commission, or if the causation requirement is not met, no further action is taken. However, when the ITC makes an affirmative finding or when the Commission is evenly divided as to whether the industry is injured, the President must determine within 60 days after receiving the Commission's report what, if any, relief should be given.

The President is not obliged to follow the recommendations of the ITC: He may deny relief if he believes that it would not be in the "national economic interest", (e.g., impact on consumers and competition). However, "foreign policy reasons" may not be the basis of relief denial. The relief the President may order is identical to that of the ITC but, in addition, he may negotiate an Orderly Market Agreement (OMA).

C. Congressional role

Under the 1974 Trade Act, the President's recommendations are implemented in the event of a disagreement between the ITC and the President. However, the President is required to report his disapproval of ITC relief to Congress within 90 days of the Commission's decision. Congress may order the International Trade Commission's remedy to be put into effect if both Houses pass a concurrent resolution by a majority vote.

IV. Section 201 of the Trade Act—remedy history

As of January 1983, there were 48 escape clause investigations initiated since 1974. They encompass a wide variety of industries, from automobiles to clothespins. Most of the investigations were made between 1975 through 1977, soon after enactment of the Trade Act of 1974. There has been a substantial decline in the number of cases brought before the ITC since then, and only a trickle since 1980, following the negative automobile decision.

In nearly 50 percent of the investigations (19), the ITC recommended that no relief be granted to the petitioning industry. When relief was recommended, increased tariffs and quotas were clearly the most frequently employed relief mechanisms (see Attachment A). Tariff Rate quotas, essentially a two tiered tariff based on quantities imported, have also been employed occasionally (3 cases). Although adjustment assistance has been granted in 3 cases, the ITC considers it an ineffective form of relief and has not used it since the 1978 Shrimp investigation.

The President has denied industries relief in 12 of the 27 cases in which the ITC recommended relief. Various Presidents have changed the type of relief in 6 cases and has lessened the amount of relief in the 9 remaining cases. Remedies the President has favored are: adjustment assistance—(5 cases); Orderly Market Agreement—(3 cases); import duties—(3 cases); tariff increase—(2 cases); price support—(1 case); and import quota—(1 case).

V. Criticism of section 201

Critics of Section 201 maintain that it has not achieved its intended purpose. The following points are most frequently raised to substantiate the claim:

A. Difficulty in obtaining relief during recession periods

Due to the causation criteria, U.S. industries find it extremely difficult to prove that imports rather than recession is a substantial cause of serious industry injury. Recession has been deemed to be a greater cause of industry difficulties than imports in many cases. The rise in joblessness, depressed demand for an industry's products, and resulting large inventory supplies are all problems which industries suffer as a result of the recession as well as increased imports. It has been, therefore, extremely difficult for the ITC to determine whether the cause of the injury is the recession or increased imports. Many industry officials believe that it is impossible to obtain 201 relief during a recession.

Recently, however, the ITC recognized this problem. In February 1983, the ITC reached an affirmative finding for the U.S. motorcycle industry. ITC Chairman Alfred Eckes stated:

> Without a doubt the unusual length and severity of the present recession has created unique problems for the domestic motorcycle industry [however], if the Com-

mission were to analyze the causation question in this way (in terms of recession) it would be impossible in many cases for a cyclical industry experiencing serious injury to obtain relief under section 201 during a recession. In my opinion Congress could not have intended for the Commission to interpret the law this way.

B. Criticisms of the ITC

An ITC trend towards denying relief seems to have begun in January 1980. (See Attachment A). Since early January, 1983, of the 8 cases initiated, 2 were pending and 5 of the remaining 6 industries were denied relief. (Since late January, the motorcycle case has been affirmatively decided—indicating a possible shift in the Commission's record of denying relief).

However, as a result of the difficulty in proving the nexus between injury and increased imports, and what appeared to be an ITC trend of relief denial, many industries stopped petitioning the ITC for relief. This is particularly true since relief was denied in the automobile case in late 1980.

In addition, the ITC has been criticized for writing incomplete, inconsistent and inaccurate economic analyses. Some of the inherent limitations of the ITC's investigation include staff unfamiliarity with certain industries (e.g. roses), absence of data relating to industries and a relatively short time frame to investigate an injured industry. In addition, some charge underutilization of in-house expertise.

C. Criticisms of Presidential decisions

In no case has the President concurred with the relief recommended by the ITC. Each President has either failed to grant any import relief or has altered or watered-down the ITC's recommended relief. Presidential reluctance to grant relief is undoubtedly due in part to the fact that under the GATT the U.S. must pay compensation to the principal supplying countries whose imports are impacted by the determination and in part due to the impact on consumers resulting from import relief, a factor which in the past—due to efforts to keep down inflation—has been a central theme for denial of relief.

But most important is that conviction to the ideal of free trade influences Presidential decisions not to interfere with the market. As Ambassador William E. Brock stated on July 8, 1981 in his trade policy statement before a Senate joint oversight hearing:

> Import restrictions, subsidies to domestic industries, and other market distorting measures should be avoided. A better solution to the problems associated with shifts in competitiveness is to promote positive adjustment of economies by permitting market forces to operate.

Few governments, including the U.S., wish to appear protectionist. Although most Presidents wish to be credited with protecting domestic industries, they also fear being labeled "protectionist", particularly when import relief involves consumer-related goods.

Thus, some industry and U.S. government interagency sources charge that the escape clause is ineffective because the President's decisions often appear to be made more on the basis of "political" factors than on the economic merits of the case (e.g. *Sugar* and *CB Radios*).

Moreover, unlike ITC decisions, Presidential decisions have historically not been supported with, for example, cost-benefit analysis as to why import relief would not be in the interest of U.S. consumers. Similarly, although USTR requests public commentary, business is not given an opportunity to address policy issues in a public forum (e.g. informal hearing). Hence, Presidential decisions have been criticized as being "made in a vacuum" and nothing more than "ritual recitals" without any substance.

D. Congressional override

Many legislators and business representatives criticize the weak Congressional role in [illegible] decisions. Although there is a Congressional override of Presidential decisions, [illegible] Congress has never overridden a Presidential determination, although there was significant support for doing so in the *Ferroalloy* case. Congress's involvement in escape clause cases has, therefore, been principally limited to requesting that Section 201 cases be reinvestigated by the ITC, (e.g. *Nuts, Bolts and Screws from Japan and Canada*).

E. Adjustment assistance as an alternative to import relief

On occasion, Presidents have elected to grant trade adjustment assistance (TAA) to workers and firms rather than impose import relief. The worker trade adjustment assistance program, authorized in Sections 221-250 of the Trade Act of 1974 and scheduled to expire on September 30, 1983, requires the President to evaluate the extent to which trade adjustment assistance could be/or has been made available to the injured industry. In this vein, Sections 224 and 264 trade adjustment assistance reports, prepared by the Secretaries of Labor and Commerce, must be submitted to the President within 15 days of the ITC determination.

However, as recognized by the ITC, TAA has failed to be an effective remedy for permitting industries to adjust. A general consensus is that although the program is important because it can ease the problems of dislocation for firms and workers it cannot, by itself, effectuate adjustment. Critics of the program have pointed out that it is extremely costly, that relocation and training programs tend to lack effective planning, and that the program may even provide a disincentive for workers to seek new employment.

F. Time and cost

Vast sums of money and much time is required in order to petition for 201 relief. Small businesses with limited resources find it particularly difficult to even apply for relief.

VI. GATT's section 201 counterpart—the "safeguard" provisions

The General Agreement on Tariff and Trade (GATT), negotiated in 1947, is the principal instrument through which the U.S. sought with its major trading allies to reverse the preferential trading practices which prevailed during the period between the two world wars. To promote trade liberalization, GATT Signatories committed themselves to the progressive reduction and elimination of tariff and nontariff trade barriers. Under the GATT, domestic industry protection was to be available as a general rule through tariffs.

However, GATT Article XIX—commonly referred to as the "Safeguard Provisions"—outlines exceptions to the general rule so that, like the escape clause, a country whose domestic industries are injured by increased imports may impose "safeguards" or temporary import relief. Under the GATT, increased tariffs, quotas, a combination tariff/quota, or an Orderly Marketing Agreement are all legitimate remedies that may be used to permit an industry time to adjust to import competition.

Article XIX, introduced at the insistence of the U.S. and unchanged since its inception, is therefore the international law analogue of the U.S. escape clause law.

1. Article XIX—terms

A. Criteria for Granting Relief. Generally under GATT Article XIX a country may impose import restrictions if it can establish that an increase in imports causes or threatens to cause serious injury to domestic producers of like or directly competitive products. Theoretically, the increase in imports must be the result of (1) unforeseen developments and (2) the effect of GATT obligations (including tariff concessions). Whether import restrictions are levied is based solely on the judgment of the importing country.

As in a 201 case, once injury is established, a GATT Contracting Party is free to suspend or modify any tariff concessions it has granted other GATT Signatories. Suspension of benefits or obligations must be limited to the imported product which caused the injury. Restrictions may continue only "to the extent and for such time as may be necessary to prevent or remedy such injury", thus reflecting the temporary theme of the Article. GATT Article I, the most favored nation provision, requires that if import restrictions are applied they must be on a nondiscriminatory basis i.e. to all nations which export to the injured country rather than to selected country exporters.

Written notice must be given all Contracting Parties that relief measures are going to be imposed. The Contracting Party invoking Article XIX is obliged to consult and try to reach an agreement with all Signatory countries having a "substantial interest as exporters of the product concerned". If consultations do not produce an agreement among the interested parties (usually financial compensation), the restrictive action may still be taken or continued but, if it is, the other Contracting Parties have the right to retaliate by withdrawing equivalent trade concessions. Furthermore, while GATT Article XIX restrictions must be imposed on a nondiscriminatory basis, retaliation may be selectively applied.

Where there may be irreparable damage to the local industry unless an immediate remedy were imposed, Article XIX allows import relief to be provisionally imposed without prior consultation on the condition that consultation occur immediately afterwords. Thus, in "critical circumstances, where delay would cause damage which . . . would be difficult to repair" temporary relief measures may be imposed immediately. While this provision was originally intended to apply only to perishable agricultural products, in practice it is used in many other types of actions.

B. Practice—Circumvention of the GATT. Unlike Section 201 of the Trade Act which is, for the most part adhered to by the U.S. Government GATT Article XIX is widely disregarded or circumvented by GATT Signatories. It has been estimated that between the years 1978-1980 there was approximately $1.7 billion trade restricted through Article XIX provisions. However, an estimated $21.7 billion trade was restricted outside the GATT.

Some methods by which Safeguards are circumvented by "administrative measures" include: industry-to-industry agreements, threats of import legislation, Voluntary Restraint Agreements (VRAs) (agreements by which exporting countries are forced to reduce exports), orderly marketing agreements (OMAs), unilaterally imposed quotas, and customs inspection delays. While all of the above methods have been used, during the past ten years VRAs and OMAs have proliferated.

The reasons for GATT avoidance vary. For the most part, by the mid-1960's many nations began to believe that the 1947 GATT rules were unresponsive to the domestic economic realities they faced in the international trading system. Governments found that they either could not comply or in some causes they believed they should not comply with the rules. For example, the failure of the GATT to regulate certain nontariff barriers (NTB's) such as Voluntary Export Restraints and various product standards led nations to begin to ignore GATT regulations and seek their own "practical solutions". (See Attachment B which reflects the European Communities limited use of the GATT adjudicatory process for Safeguard cases.)

Other reasons for widespread circumvention of GATT Article XIX include: (a) a nation's desire to protect a domestic industry without proving that increased competition resulted in serious injury, (b) a desire to avoid paying the penalties of retaliation or compensation, (c) the efficiency in resolving trade disputes bilaterally rather than through a broader GATT consensus, and (d) the need to impose import barriers on a selective non-MFN basis by targeting entire country's exports.

In the 1970's, in an attempt to enforce the GATT's provisions, the U.S. initiated a wave of GATT protests against violators. (Eight protests were initiated from 1970-1972, compared with 17 brought by all nations from 1962-1972). The tactic was only moderately successful for the GATT adjudication procedures were strongly opposed by other nations. Thus, it was difficult to reach a "consensus" that nations had violated their GATT obligations.

Enforcement of Article XIX has also been hampered by the fact that the GATT regulatory structure is hardly coercive. In theory, it authorizes the use of economic counter-measures to coerce compliance with its provisions. However, in practice, the GATT has not employed these sanctions. Furthermore, the GATT adjudicatory bodies have generally avoided emphasizing the obligatory quality of the GATT's rules.

Alternatives to current dispute settlement procedures have been seriously considered at the Tokyo Round, the GATT Ministerial meeting in November, and will be discussed further in the 1983 GATT meetings. By making the dispute settlement mechanism more effective the U.S. hopes that nations will be pressured into abiding by GATT provisions.

Serious consideration has also been given to the use of full time surveillance bodies to monitor trade practices and expose GATT violations. Although the pardigm for the idea—the Textile Surveillance Body (TSB)—was very effective, full-time surveillance would be extremely costly and undoubtly meet considerable Signatory resistance.

When Article XIX has not been avoided totally by resort to Voluntary Restraint Agreements, nations have deviated from GATT provisions by conveniently ignoring some of the article's criteria. For example, the requirement that injury result from "unforeseen developments" was defined liberally in 1950 in the United State's *Fur Hatter's* case. In that case, the United States contended that the change in ladies' hat styles was an unforeseen development which fulfilled the criteria of the safe guards provision. All the members of the GATT working party except Czechoslovakia accepted the United States argument, indicating an overall GATT consensus not to read Article XIX too literally.

In this vein, John H. Jackson has noted that the "unforeseen developments" requirement is "difficult to appraise." He has stated that ". . . not only is the causal relationship difficult to measure, but the definition of 'unforeseen development' is hazy. This term, drawn directly from United States treaty practice, was apparently little discussed in the GATT preparatory work." Due to the difficulty in defining "unforeseen developments" the requirement has been virtually ignored by most nations, especially in light of the fact that they may, theoretically, conclude that an increase in imports itself is an unforeseen development.

The causal link, requiring import increase to be a result of tariff concessions or other GATT obligation is another article XIX provision which is frequently ignored. For example, some countries have expressly rejected the need for a nexus while others have simply ignored the requirement.

GATT records indicate that the U.S., Australia and Canada are the three countries which most consistently abide by Article XIX. Of the 95 GATT Article XIX cases from 1947 to mid-1978, Australia initiated 33, the U.S. 21, and Canada 15.

Canada and Australia comply with GATT Article XIX presumably due to their stringent domestic "escape clause" legislation (similar to Section 201 of the Trade Act). Widespread deviations from the GATT's escape clause is particularly irksome for, like the U.S., it places them in the position of complying with GATT procedures such as compensation, consultation and notification while other nations do not.

Of course, like this country, Canada and Australia have also circumvented Article XIX by pressuring their trading partners to agree to Voluntary Restraint Agreements (e.g. steel, automobiles, and the Multifiber Agreement).

VII. Section 201 criteria compared to article XIX

A. Literal construction of article XIX compared to section 201

Industry officials maintain that the *need* for statutory change of 201 is evidenced by the current difficulty they have in obtaining import relief. Similarly, as reflected in testimony before the Subcommittee during the March 16, 1983 "trade remedy" hearings, there is an overwhelming consensus that the U.S. has the authority and right to liberalize Section 201 because GATT Article XIX's criteria are less rigorous than the U.S. escape clause.

It appears, however, that this presumption is based less on a literal reading of Article XIX and more on the fact that (a) for the vast majority of Signatories the GATT's provisions are neither enforced or strictly adhered to; and (b) under the GATT, a nation need not prove that it has complied with Article XIX, it merely has to explain the basis for its actions.

As explained more fully below, if Article XIX were to be read and enforced literally, it might be equally, if not more difficult, for an industry to prove that it is entitled to relief than under Section 201 (See Attachment C).

Although as a policy matter, it would be ludicrous for this country to be guided by a literal comparision between Article XIX and Section 201 (due to widespread circumvention of the GATT Article), it is perhaps ironic that U.S. trade counsel both in and out of government literally construe other GATT Articles (for example, in trying to prove that trade-distorting performance requirements violate the GATT) and the MTN Codes negotiated during the "Tokyo Round", but fail to apply a similar interpretative mode to Article XIX.

First, the most apparent reason that the GATT standard is more stringent than 201 is that under Article XIX a petitioning industry must pass a two-prong test rather than the one-prong test of Section 201 (substantial cause). Under the GATT, injury must be "a result of unforeseen developments and the effect of the obligation incurred by a Contracting Party under the agreement . . ." Thus, under Article XIX a petitioner would fail to gain import relief unless it met both tests.

Second, in a 201 case, all factors contributing to injury are considered and the petitioning industry must only prove that increased imports were one of various important causes of injury (see substantial cause definition, *supra*, page 2.) Therefore, if increased imports were one of 3 factors which contributed 33 percent each to injury, relief may be granted.

On the other hand, GATT Article XIX does not have the flexibility of 201. As noted above, injury must be "a result of unforeseen developments and the effect of the obligation incurred by a contracting party . . . including tariff concessions * * *" Strictly construed, the "a result of" language requires unforeseen developments and trade concessions to be the sole and exclusive cause of 100 percent of the injury. Thus the word "substantial" in "substantial cause" may be language which enables relief to be granted by recognizing that factors other than imports may cause injury. In other words, by qualifying that imports be a "substantial" cause 201 acknowledges that increased imports may contribute less than 100 percent of the industry injury.

Third, Section 201 may be considered to be more liberal than Article XIX because Section 201 relief may be available to U.S. industries in a wider variety of circumstances than Article XIX. The Trade Act does not require a petitioner to prove why imports have increased; it is sufficient only to demonstrate that they have increased. As a result, increased imports may result from tariff concessions, superior foreign technology, low production costs of foreign goods (and therefore lower retail prices) or any number of other reasons.

Under GATT Article XIX, however, relief is precluded if increased imports are caused by anything but trade concessions or other GATT obligations. Thus, while 201 relief from import competition may be granted when competition is the result of any variety of reasons, the GATT only permits relief from import competition resulting from GATT obligations. Superior foreign technology, low production cost of foreign goods, would not be a valid basis for relief. (The U.S. may defend imposing such import relief by pointing out that imports have increased as a result of the bound tariff rate, i.e. the lower tariff rate granted on virtually all products imported into the U.S. However, it appears that other nations which are not bound would not be able to receive relief in these situations.)

Fourth, proving that injury is a result of a "trade concession" or obligation under the Agreement rather than any other source (e.g. recession, slowed domestic production, decreased demand for a product could be as difficult a task as proving the substantiality of injury under 201. In fact, with the reform of Section 201 introduced in the Trade Act of 1974, Congress recognized the near impossibility of linking injury to trade concessions by striking the requirement from the 1962 Act.

For the above four reasons, it would appear that the U.S. standard for obtaining import relief are *not* more stringent than the GATT standards when the latter is strictly and literally construed.

VIII. Legislative reform: comments and recommendations

There are currently several legislative proposals aimed at reforming the "escape clause". They have one common theme; namely, to make it easier for U.S. industries to obtain import relief so that adjustment to increased imports can take place.

Although I am not in a position to recommend specific changes in the law, various general observations and recommendations are offered.

First, this statement essentially concludes that industries likely would find it more difficult to obtain import relief under Article XIX of the GATT—when literally read—then under this country's escape clause. Thus, in drafting reform of the U.S. law, Congress should seek from U.S. Government and private sector "GATT experts" advice as to whether a revised Section 201 would violate Article XIX and advice on the implications reform may have on, for example, U.S. efforts to reach agreement on a Safeguard Code.

Second, it appears that the reasons for ITC negative determinations relate not to the injury standard but rather to the difficulty industries have in meeting the causation criteria. Congress should, therefore, very carefully assess the impact whatever changes in the causation criteria may have since they would likely significantly increase the number of ITC affirmative determinations.

Third, there is little evidence that—for the few industries that have received import relief under Section 201—they have been able to adjust to import competition in a way envisioned initially by Congress. For this reason, Congress should welcome Senator John Heinz's proposal set forth in S. 849 which generally proposes that steps be taken towards seeing that business, labor, and government collectively frame a meaningful adjustment program before relief is granted.

Fourth, Presidential review of ITC decisions appears to be cloaked in the secrecy of the interagency process and appears to be a significant factor in the business community's dissatisfaction with the way the statute is administered. Rather than simply strike the President's role from the decisionmaking process, Congress may want to consider (1) establishing more precise criteria under which the President carries out his review, (2) requiring the President (USTR) to issue a clear and well documented statement of reasons for disapproval or modification of ITC recommendations, and (3) permitting the petitioner and other interested persons an informal hearing on the policy decisions made by the President.

More specifically, Congress may consider requiring the President to include quantitative analysis, such as a cost/benefit analysis of import relief as well as a quantitative assessment of the impact compensation would likely have in the event relief were to be provided.

Similarly, Congress could provide the President more concrete guidelines as to what factors should be considered in his review. This might benefit both the overall "public interest" (consumers etc.) and petitioners as well. For example, Presidential decisions have rarely included meaningful analysis as to the impact the denial of import relief were to have, in the words of the Senate Finance Committee Report, on "taxpayers, communities and workers". Similarly, no real Presidential assessments have been made as to the impact compensation would have on U.S. industries

as a result of Section 201 import relief. In this regard, before reforming the escape clause, Congress should seek from the Special Trade Representative's Office an analysis as to the history of compensation and its effect on U.S. industries under Section 201.

ATTACHMENT A.—USITC INVESTIGATIONS COMPLETED UNDER SECTION 201 OF THE TRADE ACT OF 1974

Investigation	ITC recommendations	President's actions
Birch-door skins (TA-201-1)	No relief	
Bolts, nuts and screws (TA-201-2)	No relief	
Wrapper tobacco (TA-201-3)	No relief	
Asparagus (TA-201-4)	Import quotas [1]	No relief (3-10-76).
Stainless and alloy tool steel (TA-201-5)	Import quotas [2]	(Orderly marketing agreement later than 6-14-76).
		Import quotas (3-16-78) Proissued 5-11-76.
Slide fasteners (TA-201-6)	Adjustment assistance [1]	Adjustment assistance (4-14).
Footwear (TA-201-7)	Rate increase (3 Comm) tariff rate quotas (2 Comm) adj. assistance (1 Comm).	Adjustment assistance (4-1).
Stainless steel flatware (TA-201-8)	Tariff quotas (4 Comm.) Adj. assistance (2 Comm).	Adjustment assistance (4-30).
Gloves (TA-201-9)	No relief	.
Mushrooms (TA-201-10)	Adj. assistance (3 Comm) Tariff rate quotas (1 Comm).	Adjustment assistance (5-17).
Ferricyanide and ferrocyanide blue pigments (TA-201-11).	Rate increase	No relief (6-1-76).
Shrimp (TA-201-12)	Adjustment assistance [1]	Adjustment assistance (7-7.
Round stainless steel wire (TA-201-13)	No relief	
Honey (TA-201-14)	Tariff rate quotas	No relief (8-28-76).
Plant hangers (TA-201-15)	No relief	
Sugar (TA-201-16)	Import quotas	Price support (5-4-77).
Mushrooms (TA-201-17)	Tariff rate quotas (3 Comm) adj. assistance (2 Comm).	No relief (3-11-77).
Footwear (TA-201-18)	Quotas (4 Comm) rate increase (1 Comm) adj. assistance (1 Comm).	Marketing agreement (6-21).
Bolts, nuts and large screws (TA-201-37)	Import quotas	Imports duties (12-22-78).
Machine needles (TA-201-38)	No relief	
Nonelectric cookware (TA-201-39)	Tariff increase	Tariff increase (1-2-80).
Leather wearing apparel (TA-201-40)	Tariff increase	No relief (3-24-80).
Certain fish (TA-201-41)	No relief	
Roses (TA-201-42)	No relief	
Mushrooms (TA-201-43)	Quotas	Tariff increase.
Automobiles (TA-201-44)	No relief	
Fishing rods (TA-201-45)	No relief	
Tubeless tire valves (TA-201-46)	No relief	
Heavyweight motorcycles (TA-201-47)	Pending	
Stainless steel (TA-201-48)	Pending	

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[1] Commission vote was divided evenly; the President had the option of selecting either.

ATTACHMENT B.—EUROPEAN COMMUNITY: TRADE ACTION UNDER SAFEGUARD PROVISIONS, 1971–82 [1]

	Number of investigations initiated	Number of decisions leading to trade actions [2]	Nature of actions taken [3]	Countries affected by trade actions
Year:				
1971				
1972				
1973	3	3	3(Q)	All sources of imports.
1974				Japan, Korea, Taiwan.
1975				
1976	2	2	6(Q)	Bulgaria, German Dem. Rep., Czechoslovakia, U.S.S.R.
1977	6	6	2(Q)	Bangladesh, India, Japan, Spain, Thailand, Yugoslavia.
1978		1	Q*	Taiwan.
1979		6	6(Q)	Bangladesh, Bulgaria, Czechoslovakia, German Dem. Rep., India, Thailand.
1980	3	2	2(Q)	United States.
1981				
1982 [4]				

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[1] Does not include safeguard actions taken under bilateral agreements implementing the Multifiber Arrangement. Also does not include measures of import surveillance.

[2] This column lists actions actually taken during a particular year, including action taken on investigations launched in previous years.

[3] Q=Quotas under safeguard action; Q*=Renewal of quotas.

[4] To April 14, 1982.

ATTACHMENT C.—IMPORT RELIEF UNDER THE TRADE ACT OF 1974 AND GATT ARTICLE XIX

	Trade Act 1974 § 201	GATT article XIX
Eligibility for relief	Increased quantity of imports	Same.
Degree of injury required	Serious injury of threat thereof	Same.
Other factors petitioner must prove to obtain relief.	Increased imports must be a substantial cause of injury.	Injury must be a result of: (a) unforeseen developments, and (b) Tariff Concessions (or other GATT, obligations).
Discrimination permitted? (i.e., may restraints be applied to selected countries).	Yes	No.
Definition of industry defined by imports	Article like or directly competitive with the imported article.	Same.
Factors taken into account in making determination.	All relevant economic factors	N/A Nations determination.
Body responsible for determining eligibility	ITC, president, Congressional override possibility.	Contracting party.
Requirement of public hearings on relief determination.	Yes	No.
Determination deadline	6 months for ITC; 2 months President	N/A.
Possibility of reinvestigation	Yes, 1 year after previous investigation	N/A.
Duration of import relief	5 years, with 3 year Maximum extension	As long as necessary.
Digressive relief provision	Yes, if relief endures for more than 3 years digressivity required.	Not required. Concessions may be modified, however.
Availability of compensation	Yes, compensation authority under Section 123 Trade Act.	Yes, required.
Is notice to importing party required	No	Yes.
Consultation required	No	Yes.
Retaliation Permitted	Yes	Yes.
Economic Adjustment taken into account	Yes	Not required.

INTERNATIONAL ECONOMIC POLICY ASSOCIATION,
Washington, D.C., April 19, 1983.

Hon. SAM GIBBONS,
Chairman, House Ways and Means Subcommittee on Trade,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed are six copies of our statement on Trade Remedy Laws for inclusion in the hearings record. As you know, we have testified on many occasions before your committee on issues dealing with international investment, trade, taxation and balance of payments. For the most part, this testimony is drawn from our recent book on "U.S. Foreign Economic Strategy for the Eighties," copies of which have already been sent to you and the committee staff.

We believe the one overriding omission in U.S. trade policy has been the lack of a coherent U.S. foreign economic strategy which does not rest on protectionism. For the lack of such strategy, we have allowed other nations to become comfortable in their use of export subsidies and other devices to further their trade interests. Since unhampered trade and investment promotes the best use of resources by all peoples, the United States must maintain a deterrent to insure that an open world trading system will, in fact, remain available to us.

This statement highlights international service industries and urges that extension of similar trade law remedies now available to the goods industries in situations of dumping and subsidy be available to trade in services. As examples of nontariff barriers encountered by U.S. service industries, I point to international aviation and the series of hearings held by the House Public Works and Transportation Subcommittee on Oversight and Investigations, chaired by Congressman Levitas.

U.S. import relief laws, exercised in accordance with our international obligations, should be used in concert with adjustment assistance and unemployment benefits to promote modernization of U.S. industries and upgrading of U.S. workers' skills. We must be prepared for an integrated approach to this area if we are to remain competitive. We also believe that Section 301 of the Trade Act of 1974 should be expanded and Section 1912 of the Export-Import Bank Act liberalized. In addition, a permanent funding vehicle should be available to U.S. industry which would automatically meet the terms and conditions of sales by foreigners that are helped with credit subsidies.

Finally, your committee may want to explore the growing competition faced by U.S. exporters from state-run economies and mixed economy businesses, for we believe this area will require much more attention in the future.

I hope that this statement will be of help to you and the committee staff in your ongoing review of trade remedy laws.

Sincerely,

RONALD L. DANIELIAN,
Executive Vice President and Treasurer.

STATEMENT OF RONALD L. DANIELIAN, EXECUTIVE VICE PRESIDENT, INTERNATIONAL ECONOMIC POLICY ASSOCIATION

The International Economic Policy Association is a nonprofit organization established in 1957, which analyzes public policy issues in the international economic area. These have included international trade, investment, taxation, raw materials and exchange rate policy questions and international monetary issues. We recently completed a book on "U.S. Foreign Economic Strategy for the Eighties," copies of which have already been sent to the Subcommittee.

We are not new to the international trade area and we have long held that the maximum feasible amount of freedom in international trade, investment, and capital movements is needed to assure a prosperous and growing world economy. When guided by the international dictum of comparative advantage, an open system of trade and investment provides the greatest benefit to consumers and workers around the world. But in cases where comparative advantage is "managed," nations have had to establish common rules to protect their own interests in the face of subsidies, dumping, or other unfair trade practices by other countries. A set of international rules is laid down in the GATT for dispute settlement and reciprocal codes have been negotiated under the GATT umbrella to overcome specific trade barriers in standards or government procurement that have cropped up in recent years.

Nevertheless, as world growth was cut in half by the oil embargo and price escalation of 1973 and the subsequent price increases, especially in 1979, world trading nations have endeavored to secure for themselves a growing share of a declining market. This has entailed the use of favorable government financing for exports and, in some cases, devaluations to insulate domestic economies from painful but necessary fiscal adjustments.

In the 1960's and 1970's, there developed trading blocs, including the Common Market, whose establishment was supported by the United States for both economic and political reasons. The less developed world increased their rate of industrialization to the point that they were demanding, as a right, preferential treatment for their goods in order to pull themselves up to "industrial country" status. As major industrial countries were beset by recession in the 1980's, a scramble got underway for market shares in the export area. Through all of this, the one overriding omission in U.S. policy has been the lack of a coherent U.S. foreign economic strategy which does not rest on protectionism. For the lack of such strategy, we have allowed other nations to become comfortable in their use of export subsidies and other devices to further their trade interests.

Since we believe that unhampered trade (and investment) promotes the best use of resources by all peoples, the United States must maintain a deterrent to insure that an open world trading system will in fact remain available to us. That deterrent should not be applied on a unilateral (or bilateral) basis except in circumstances of continued trade aggression where multilateral efforts have failed.

To place import limits on a sectoral or regional basis, e.g., Japanese cars, European steel, Latin American sugar, etc., can be justified on an emergency basis for a limited adjustment period, but it must not become the prescription for ensuring the survival of a high-cost, noncompetitive domestic industry. If adjustment is not forthcoming and the industry appears to be treading water while hiding behind a tariff barrier, then the American consumer and the U.S. economy should not have to pay the higher prices for that inefficiency.

Nevertheless, a deterrent must be maintained that lets foreign nations know that the U.S. will not allow competitive U.S. products to be undercut by reason of foreign government subsidies, dumping, or general unfair trade practices. To do less leaves the door open for a tremendous amount of political pressure to be exercised under the banner of protectionism. For the present and future decades, we must be prepared to identify new areas of trade opportunity and attack new impediments to trade and investment. We therefore commend the Subcommittee for its timely series of hearings on what can be done to improve the application of trade law remedies.

We believe that the services sector, including accounting, engineering, construction and architectural services and transportation, is an important area which has been neglected even though subjected to many nontariff barriers. A basic problem is that this area of international activity has never been included in the GATT. In addition, U.S. laws which allow action against subsidy, dumping, or unfair trade are generally not available to services. The United States has never condoned the practice of dumping or unfair trade advantages through subsidies for trade in goods. For over 50 years, we have maintained various legal remedies to combat such export practices which distort comparative advantage in international trade. In any trade law remedy reforms being considered by this committee, consideration should be given to extension of similar remedies now available to the goods industries in situations of dumping and subsidy of internationally traded services. While it may be more difficult to define dumping or identify the subsidies in service industries, as a matter of principle there should not be a double standard for goods and services.

As an example of the types of nontariff barriers encountered by U.S. service industries, the area of international aviation might be instructive for the committee to explore. A series of hearings held by the House Public Works and Transportation Subcommittee on Oversight and Investigation, chaired by Congressman Levitas, looked at international aviation issues and in particular the problems besetting U.S. industry under our new open skies aviation policy. This hearing record is replete with evidence of the problems encountered by U.S. international aviation companies. Some of the nontariff barriers are subtle and others are rather blatant—such as the physical blocking of a U.S. aircraft at the departure gate so that the flight would be grounded overnight by a curfew at an Asian international airport. The several witnesses appearing on this issue, including airline chief executives, Ambassador Brock, former Transportation Secretary Adams, and former CAB Chairman Kahn, all agreed that subsidies for airline services in international trade should not be condoned. The United States should take action against such practices so that U.S. international service firms including aviation companies are not placed at a competitive disadvantage through "managed" comparative advantage.

We believe that existing U.S. import relief laws, exercised in accordance with our international obligations, should be used and linked with adjustment assistance and unemployment benefits to promote modernization of U.S. industries and upgrading of U.S. workers' skills to take on the higher value-added, more technical jobs which will be created as higher technology industries expand in the United States. Their use in declining industries must be understood to be temporary so that those industries can modernize or change.

Section 301 of the Trade Act of 1974, as amended, should be expanded to authorize action against the import or importer of services found to be engaged in unfair competition. Also, 301 should be amended to specifically authorize its use against trade-distorting investment practices. Since one-third of U.S. exports go to American companies abroad, foreign performance requirements on investments will invitably distort trade flows.

While it is vitally important for the U.S. Government to continue its efforts through multilateral bodies such as GATT to expand their scope for inclusion of service industries, we cannot wait for the years that it will take to gain a foothold for service consideration in these forums. We must be prepared to apply the U.S. remedies now available to the good industries to services.

We should liberalize the use of Section 1912 of the Export-Import Bank Act which allows the Bank to use its programs on a domestic sale which faces subsidized foreign official export credits. At the present time, it is up to the Secretary of the Treasury to determine whether or not the foreign government action is "likely to be a determining factor in the sale." We believe that the standard that should be used is that it is a "significant" factor. In addition, we believe that the Secretary of Treasury's determination under Section 1912(b)(1) should be open for review by the U.S. Court of International Trade. Where credit subsidy outside of existing "agreements" is found to be a significant factor, an amount equal to the margin between it and the U.S. financing should be recoverable by the U.S. firm from the importer.

To equalize the terms of international trade competition, we believe that a permanent funding vehicle should be available to U.S. industry which would automatically meet the terms and conditions of sales by foreigners that are helped with credit subsidies and the like. In no case, however, should the U.S. Government set its credit limits on financing of exports any higher than that which is established through agreement with other nations. To arbitrarily impose higher credit restrictions on U.S. exporters is to abdicate foreign markets to the competition. But the United States should also not add any additional measure of financing subsidy to the export sale above that being used by the foreign nation for the competing product. In other words, we do not believe that our government should ever make the "first strike" in export subsidy "wars," but we should be prepared to meet the competition, which itself will be a form of deterrence to others.

Finally, U.S. exporters will face growing competition from state-run economies and mixed economy businesses. We believe our trade laws should contain stricter antidumping standards for determining whether or not the state-controlled economy provisions of the Trade Act of 1974 should be used. For instance, it should not be necessary for the whole economy to be state-run before the SCE provisions apply. There could be a growing number of cases where the state-controlled sector of a mixed economy is engaged in dumping. The statutory language could usefully be amended along these lines, although some criteria (such as degree of state ownership, subsidy or effective control or operation) may be needed to define when an enterprise or sector is predominantly state-controlled.

FRANCIS SHORE ASSOCIATES,
Washington, D.C., March 23, 1983.

JOHN J. SALMON,
Chief Counsel, Committee on Ways and Means,
Longworth House Office Building,
Washington, D.C.

DEAR MR. SALMON: This is in reference to the recent hearings by the Subcommittee on Trade held for the purpose of discussing options to improve the trade remedy laws. Your release #3 of February 15, 1983, stated that the Subcommittee was particularly interested in determining how the expense and time involved in processing cases under current procedures might be reduced in order to ensure industry and labor, including small business, access to trade remedies.

On behalf of the National Association of Chain Manufacturers, an organization whose members make most of the welded and weldless link chains of steel produced in the United States. I, as Trade Consultant to the Association, herewith submit the following information in connection with your study.

The NACM is composed of relatively small closely-held companies whose facilities, manpower, and finances are too limited to justify expending the time and incurring the expense involved in requesting and obtaining relief from import practices that have repeatedly been deemed to be unfair. We petitioned for and received an affirmative determination that exports of steel chain from Italy to the United States had received benefits determined to be bounties or grants under the countervailing duty statute and a countervailing duty was imposed. Exhibit A enclosed gives you an idea of the time involved and the efforts we had to make to obtain this relief. At that time, all that had to be proved was that bounties or grants had been bestowed by the Government of Italy on the exports. Subsequently, pursuant to the Trade Act of 1979, existing countervailing duty cases were retroactively subject to an injury investigation by the International Trade Commission and petition was made to the ITC by the principal Italian exporter for such an investigation. By this time, our patience and resources were exhausted and we withdrew our original petition.

As another example of our frustrated affairs to obtain relief from unfair trade practices, NACM informed the Commissioner of the U.S. Customs Service that possible violations of the country-of-origin marking provisions of Section 304 of the Tariff Act of 1930, as amended (10 U.S.C. 1304) had been reported to us and we requested an informal investigation to determine the facts of the matter. As you will note from Exhibit B, many months later we wrote the Commissioner again stating that we had much correspondence and many telephone calls but had not been able to determine the status of this proceeding. Six weeks after the date of our second letter to the Commissioner we received a letter (Exhibit C) from the Assistant Commissioner which we do not feel has addressed itself to our problem and our request.

These are but two of the numerous "horrible examples" that could be cited as evidence of the bureaucratic roadblocks that confront U.S. industries in their attempts to obtain relief from our Government from unfair import practices. Not only are the constant delays time-consuming but the efforts required to even get acknowledgment of the receipt our communications costs us unnecessary expenditure of money, manpower, and frustration. There must be a better way.

Any consideration that your Subcommittee may give to our problems would be very much appreciated.

Sincerely yours,

Francis M. Shore, Jr.,
Trade Consultant to the National Association of Chain Manufacturers.

Enclosures.

Exhibit A

Halfpenny, Hahn & Roche,
Chicago, Ill., April 19, 1978.

John M. Martin,
Chief Counsel, House Committee on Ways and Means,
Longworth House Office Building, Washington, D.C.

Dear Mr. Martin: With reference to your Subcommittee on Trade's February request for information, advice and recommendations concerning the statutes pertaining to unfair trade practices, I am submitting the following as an example of how the Treasury Department has handled one countervailing duty case.

I am Counsel for the National Association of Chain Manufacturers, whose members manufacture most of the steel link chain made in the United States. On September 29, 1976, I submitted on behalf of our Association a petition for the imposition of countervailing duties on imports of steel chain and parts thereof from Italy. The petition was accepted as being in satisfactory form on October 1, 1976, and Treasury was required to issue a preliminary finding no later than April 1, 1977. Treasury's preliminary determination was that the Government of Italy had given benefits to exporters of chain which were considered to be bounties or grants under the countervailing duty statute. A final determination was to be made by October 1, 1977. Effective October 11, 1977, Treasury announced the imposition of countervailing duties and the suspension of liquidation of all entries of the subject Italian chain and parts thereof. The announcement stated, however, that information recently (emphasis added) supplied by the principal Italian exporter of this product to the United States indicated that he may not receive a bounty or grant and that further investigation would be required to determine the validity of this claim.

This circumstance came as a complete surprise to me and I wrote to Mr. Robert Mundheim, General Counsel of Treasury, on October 19, 1977, asking why I was not previously informed as to the exporter's claim, pointing out that we had already waited for over a year to find out what Treasury's final (emphasis added) might be and that at no time was anything said about the exporter's contention. I asked for an estimate as to how long the further investigation might take and I also asked for a citation as to the statute or regulation that provided for such a further investigation.

A reply to my letter was not received until December 8, 1977. It was signed by Peter D. Ehrenhaft, Deputy Assistant Secretary and Special Counsel (Tariff Affairs). In this letter it was stated that the principal Italian exporter of chain to the United States provided information in July 1977 (emphasis added) indicating that he paid a variety of customs duties and indirect taxes which are not included in the value-added tax which is rebated upon export and the customs duties are not eligible for drawback. It was stated further: "Treasury policy has been not to consider the rebate of indirect taxes which are directly related to the manufacture of a product and normal customs duty drawback as constituting the bestowal of bounties or grants. If a firm or domestic industry does not receive rebates of such allowable taxes or customs duties upon exportation, Treasury has allowed their use as offsets to the effective amount of any export subsidy otherwise received. This policy was most recently also applied in the countervailing duty case involving leather wearing apparel from Uruguay."

Mr. Ehrenhaft stated further that the Italian manufacturer alleged that the customs duties paid and not rebated exceed the size of the Italian Government rebate and that therefore no net bounty or grant could be said to exist. Treasury required verification of the exporter's claim, but regretted the fact that the verification process could not be completed in time for the "Final Determination." No answer was given to my question as to how long the further investigation might take, and the only authority cited was "Treasury policy."

On January 4, 1978, I wrote to Mr. Ehrenhaft noting that information regarding possible offsets was provided by the principal Italian exporter in July 1977, but that after nearly six months (now nine months) had elapsed the verification process had not been completed. I asked again if there was any limitation on the length of time such proceedings may take. I pointed out that the Trade Act of 1974 specifically states that the Secretary of the Treasury shall make a final (emphasis added) determination within 12 months from the date on which a petition is filed and I again asked for a citation as to what specific provisions of the statutes permit the Treasury Department to continue an investigation after a final determination has been made. The last paragraph of my letter was as follows:

"In the event that Treasury should determine that in its opinion the Italian exporter rather than the domestic manufacturers is entitled to relief, what procedures are available to us to contest such a determination?"

No reply being forthcoming, our Washington representative contacted the Treasury Department on March 2, 1978, and located a person who just happened to have my letter in his basket. He was very apologetic and promised to have a reply out within a week. I later received a letter from Mr. Ehrenhaft, dated March 17, 1978, stating that my January 4 letter had been misplaced, which occasioned the delay. Among other things, he referred me to the countervailing determination involving leather wearing apparel from Uruguay published in the Federal Register of January 30, 1978 (43FR3974) as being an example of the application of offsets. I quote below an excerpt from that determination as an example of strained economic reasoning:

"Subsequent investigation lead to the conclusion that the subsidy granted to the tanners upon exportation of the finished leather wearing apparel constitute a bounty or grant within the meaning of the Act. Based on present information available, however, the tanners' subsidy serves to make Uruguayan tannery prices equal with neighboring country competition, which is readily available to leather wearing apparel manufacturers in Uruguay. Thus the net effect of the bounty or grant is zero since the cost of producing leather wearing apparel absent the subsidy would not be increased due to lower prices available from neighboring countries. In addition, the effect of the export subsidy is offset by certain fiscal charges which are indirect taxes that are directly related to the exported leather wearing apparel. These taxes are not rebated on export, and under the Act would be eligible for rebate and thus act to reduce the effective export benefit."

Mr. Ehrenhaft closed his letter with the following:

"My staff informs me that counsel for Weissenfels is preparing a submission in conjunction with the Italian Government and as soon as it is filed it will receive our prompt (emphasis added) attention."

That is where the matter stands as of today. My question remains unanswered and apparently the Treasury Department is more concerned with servicing the needs of foreign manufacturers to the detriment of our own domestic producers. My recommendation would be that "final" should mean "final" and that the Treasury

Department be barred from conducting open-end investigations in contravention of the statutes.

Sincerely yours,

HAROLD T. HALFPENNY.

EXHIBIT B

HALFPENNY, HAHN & ROCHE,
Chicago, Ill., December 23, 1982.

Re: country of origin markings on foreign made steel link chain.

Hon. WILLIAM VON RAAB,
Commissioner, U.S. Customs Service,
Treasury Department, Washington, D.C.

DEAR COMMISSIONER VON RAAB: I am writing once again on behalf of the National Association of Chain Manufacturers (NACM) whose members produce the majority of steel link chain manufactured in the United States.

On February 3, 1982 I wrote on behalf of NACM about possible violations of the country of origin marking provisions of Section 304 of the Traffic Act of 1930, as amended (19 U.S.C. 1304), involving imported steel link chain of foreign origin. A copy of my letter is attached.

In this letter NACM asserts that the existing lack of an indelible and permanent country of origin marking on foreign-made steel link chain being imported into the United States is an unfair trade practice that is injurious to the economic health of the domestic chain industry, and deprives the ultimate purchaser in the United States of the notice of country of origin of foreign-made chain which the Act requires.

To remedy this serious problem, NACM has suggested amending the Custom Regulations to require that imported steel link chain:

1. Be permanently and legibly marked with the country of origin by die stamping, molding, etching, raised lettering, or an equally permanent method of marking; and
2. Such marking be made on the chain itself, by marking links thereof in a conspicuous manner and place at intervals of no more than six feet.

Under the circumstances present in our case, such a change in the regulations is required by the Act, which calls for a marking to be as indelible and permanent as the nature of the article permits, and may be made by the Commissioner of Customs. Similar amendments to the regulations have been made in other similar cases. (See e.g., TD 81-162, 46 FR 30338; TD 81-236, 46 FR 51243).

In my initial letter I noted that this is a serious problem for the domestic chain industry and expressed my trust that the United States Customs Service would give the matter the prompt attention it deserved. Unfortunately, I feel the matter has been poorly handled and neglected by the Customs Service at least to this point.

NACM has had correspondence and telephone conversations with various officials of the Entry Procedures and Penalties Division regarding this matter. As requested, NACM has carefully complied with the request of the Customs Service for specifics and examples of the types of chain imports on which we have based our allegations.

We have supplied the specific information requested and have even gone so far as to obtain samples of the products involved for inspection by the Customs Service. In shot, we have done everything in our power to supply you with the information you need to carry out this investigation and determine that our suggested amendment to the Customs Regulations is warranted.

On several occasions we have requested personnel within the Customs Service to inform us as to whether an investigation is under way, and if so to be advised as to its progress. Enclosed are some copies of the correspondence we have had in this regard.

The only written reply we have received for our efforts in this entire proceeding is a letter dated November 10, 1982 from Mr. Darrell D. Kast, copy attached. This response is a totally worthless one from our standpoint as it refers to imported roller chain, with which NACM is not cincerned, and further it indicates that at best your field offices do not communicate well either.

We do hope by communicating with you again in this matter that the National Association of Chain Manufacturers will be able to obtain some specific relief which is expressly authorized by the Tariff Act of 1930 and the Customs Regulations. We trust that through your good offices the appropriate personnel in the Customs Service can give this case the immediate attention it deserves. At a minimum, I believe NACM deserves some communication from the Customs Service indicating the present status of this proceeding, and the outlook for future progress.

At this point in this proceeding NACM is of the opinion that it has made out a case to require the amendment to the Customs Regulations which we have requested in our early communications. It is only through a permanent method of marking on the chain link itself at designated intervals that the ultimate purchasers in the United States will be informed that the chain being sold is of foreign manufacture. We only ask that the Customs Service Regulations be made specific so as to accomplish thius result, the very result Congress intended when it passed the Tariff Act of 1930.

Respectfully submitted,

HAROLD T. HALFPENNY,
General Counsel, National Association of Chain Manufacturers.

HALFPENNY, HAHN & ROCHE
Chicago, Ill., February 3, 1982.

Hon. WILLIAM VON RAAB,
Commissioner, U.S. Customs Service,
Treasury Department, Washington, D.C.

DEAR COMMISSIONER VON RAAB: I am writing on behalf of the National Association of Chain Manufacturers (NACM), whose members produce the majority of steel link chain manufactured in the United States. I am Counsel for the Association.

Activities that involve unfair trade practices, with particular reference to possible violations of the country-of-origin marking provisions of Section 304 of the Tarriff Act of 1930, as amended (19 U.S.C. 1304), have been reported to us and we respectfully request that the U.S. Customs Service institute an informal investigation to determine whether the statutory requirements are being properly complied with by foreign chain producers and domestic chain importers.

Section 304(a) of the Tariff Act of 1930 states that every imported article of foreign origin, or its container, shall be legibly and conspicuously marked to indicate to any ultimate purchaser in the United States the English name of the country of origin of the article. According to the statute, the marking is to be as indelible and permanent as the nature of the article permits. In furtherance thereof, the Secretary of the Treasury is authorized to require specific methods of marking articles.

The Customs Regulations amplify that marking requirements are best met by a marking that is "worked into the article at the time of manufacture" which for metal articles means a marking that is die sunk, molded or etched. The regulations provide that the Commissioner of Customs may require specific methods of marking foreign articles—including die-stamping, cast-in-the-mold lettering, etching or engraving—to assure compliance with the statute.

Marking the containers of foreign-made steel link chain does not give the ultimate purchaser in the United States the notice required by statute and desired by such purchaser. In many instances the ultimate U.S. purchaser of foreign-made chain, including industrial users, buy the article in hardware outlets or from industrial distributors in cut lengths without ever seeing the original container. In other cases the foreign-made chain is repackaged prior to ultimate purchase in the U.S. and, whether accidently or intentionally, the container's origin label is not transferred.

Moreover, there have been cases where the origin labels on a container have been consistently covered over by the importers' shipping labels prior to ultimate purchase in this country. In other instances, chain purchases have been made from catalogues or other lists which give no country of origin information whatsoever.

Marking the country of origin on foreign-made chain by use of metal tags, either supplied to the importer with the chain or attached at intervals, is equally inadequate. Such a method of marking is far too easily removed from the chain. A permanent marking of foreign-made chain is needed to ensure that an ultimate purchaser in the United States will be aware of the country of origin of the article.

In our experience most U.S. users of chain believe it to be of domestic origin unless it is plainly marked to the contrary, and that this has resulted in lost sales to us. We believe that such unfair trade practices are injurious to the economic health of our industry and we ask for your help in mitigating these circumstances.

NACM suggests that in order to provide for uniformity of application of the Act's country of origin marking requirements, imported steel link chain be marked with its country of origin using the following method or any similar method:

1. Steel link chain, imported by a distributor for resale to ultimate purchasers in the United States, shall be permanently and legibly marked with the country of origin by die stamping, molding, etching, raised lettering, or an equally permanent method of marking; and

2. The marking be made on the chain itself, by marking the links in a conspicuous manner and place at intervals of no more than six feet.

I look forward to discussing this matter with your office at any convenient time. This is a serious problem for our domestic industry, and we trust you will give it the prompt attention it deserves.

Very truly yours,

HALFPENNY, HAHN & ROCHE,
By HAROLD T. HALFPENNY.

EXHIBIT C

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., February 3, 1983.

HAROLD T. HALFPENNY, ESQ.,
General Counsel, National Association of Chain Manufacturers,
Chicago, Ill.

DEAR MR. HALFPENNY: This is in response to your letter of December 23, 1982, concerning alleged country of origin marking violations of imported steel link chain. As a consequence of prior correspondence from you, we have written our field offices asking for an investigation of this matter.

We do not feel it is necessary to change the Customs Regulations on this matter. It is Customs position that link chain should be marked to indicate the country of origin by a permanent means such as die-stamping or metal tags attached to the chain at 6 to 10 foot intervals or less.

Independent of your latest letter, we received a report from our field officers regarding this problem and they inform us that Customs offices have been instructed to pay particularly close attention to the importation of the seven importers specified in your complaint on behalf of the National Association of Chain Manufacturers. We believe Customs offices are doing the best they can to monitor this situation and you can assure your client that Customs will prevent any violations of marking should they be discovered.

Sincerely,

ROBERT P. SCHAFFER,
Assistant Commissioner (Commercial Operations).

STATEMENT OF DONALD GREENBURY, PRESIDENT, NATIONAL TOOLING & MACHINING ASSOCIATION

Mr. Chairman and Members of the Committee: My name is Donald Greenbury. I am president of Arrowsmith Tool & Die Corporation in Southfield, Michigan, and President of The National Tooling & Machining Association. The National Tooling & Machining Association represents the tool, die and precision machining industry. The industry is composed of 14,000 independent contract manufacturing plants, almost all of which are small business concerns. These companies build special tools, dies, jigs, fixtures, molds, gauges, special machines (automation, robotics, and production lines), precision machined parts, and components. Without the products and services of this industry, virtually all manufacturing as we know it would grind to a halt.

The actual volume of imports and exports of our industry's products is comparatively low, at about 5% of our production. However, when major U.S. manufacturers—our customers—lose market shares to imports, our business suffers accordingly. We have also observed subsidized tooling imports from Canada and Japan penetrating our shrinking domestic markets. Thus, the issue of international trade is one of great concern to us.

We appreciate the opportunity to submit testimony on trade remedy laws. We find two serious problems with current trade remedies. The first is that they do not provide timely and efficient remedies in areas that are currently considered trade violations. The second problem is that GATT does not address important issues crucial to "fairness" in international trade.

A simple review of the total number of cases filed with the International trade Commission shows the success of U.S. industry is very low. In the cases where a company of industry was successful, remedies have been minimal. U.S. companies and/or organizations representing the industry in question spend many thousands of dollars and typically wait a considerable and unreasonable amount of time for the outcome. The conclusion that one reaches based on these statistics is that either the system isn't working or unfair trade practices on the part of foreign companies of foreign nations are insignificant and almost nonexistent. Yet, in industry after industry one hears examples of products coming into the U.S. market at less than the cost of their raw material components. Obviously, for some reason which goes beyond manufacturing efficiencies, there is tremendous disparity.

In many cases, the advantages enjoyed by foreign competition are a result of illegal export subsidies. The requirements to prove the existence of such subsidies are beyond the capability of plaintiffs before the International Trade Commission in most cases. We suggest that assistance be given to the prosecution of such claims by domestic manufacturing interests by providing for the United States to pay some or all of the expense of successful complaints.

We have recently obtained a copy of a three-inch thick "Handbook of Grants and Subsidies of the Federal and Provincial Governments" describing assistance that is available from the Canadian Government. (The Handbook is published by S.T.M. Corp. of Montreal.) The handbook describes numerous programs which clearly violate the GATT policy of precluding contracting parties from subsidizing exports. For example, the Canadian International Development agency administers the Industrial Cooperation Program which provides direct support to Canadian companies investigating industrial cooperation opportunities in developing countries. The program provides financial assistance (up to $10,000 per project) for preliminary analyses of projects and further financial assistance for viability studies (up to $100,000 per project on a flexible matching basis) designed to lead directly to investment decisions. The program absorbs travel and lodging expenses associated with undertaking export programs, thereby subsidizing the Canadian exports.

Among its other purposes, Canada's Defense Industry Productivity Program is designed to provide assistance to Canadian business in developing defense products for export purposes. The program covers up to 50% of the costs of research and development projects, machinery acquisition and other production costs, with loans available for the remaining 50% of certain costs. According to the Handbook, $40 million worth of contributions were made under this program in 1978–79. This program provides direct subsidies to defense exports.

The program for Export Market Development (PEMD) provides financial assistance for exports of Canadian agriculture, fisheries, and food products by sharing the financial risk of entering foreign markets. The Canadian government shares development costs, promotion expenses, and provides financial assistance for establishing the Canadian production capability.

However, in many cases the subsidies are perfectly legal under the General Agreement on Tariffs and Trade. A competing nation may subsidize a particular industry as much as it wishes so long as the purpose of the subsidy is not solely to increase exports. In addition to the foregoing examples of programs designed specifically to support, encourage, and subsidize exports, the Canadian Handbook contains an almost endless array of other internal programs by which Canada assists industry and which could be utilized to indirectly subsidize exports. One program is of particular interest to NTMA. Canada has a Critical Trade Skills Training program that provides assistance to employers in the private sector to stimulate the training of blue-collar workers in skilled occupations where shortages exist. The Canadian program provides direct financial and consulting assistance. NTMA supports a bill which is currently before the House Ways and Means Committee that would provide similar assistance to American business in providing skilled trades training. Section 3 of H.R. 897 would provide indirect assistance to American businesses through a targeted jobs credit. We would like to take this opportunity to call that legislation to your attention and to urge your support.

Of course, the United States subsidizes industries in a variety of ways. Some industries, such as agriculture, are subsidized, while other sectors of the American economy receive little or no subsidization. When U.S. industries complain about the disparity, our foreign competitors are quick to point out that such internal subsidies are legal under current trade law and that there is nothing to prevent the United States from enacting similar subsidies. What has prevented us, of course, is the deeply engrained concept of laissez faire, the doctrine which holds that there should be minimal government interference in the private sector. The result has been that an increasing share of the gross national product of competing nations has been directed to subsidize the growth of targeted industries while a much lower share of the U.S. GNP has been used to subsidize a limited sector of the U.S. economy.

What is needed to solve the subsidy problem is to control the total amount of subsidy which can be offered by any GATT signatory. This should be expressed as a percent of their gross national product. Once this is achieved, the average subsidy of the private sector in every GATT country would be similar. Subsidies could be diverted from one industry to another as national policy dictates, but on the whole the private sectors in competing nations would be competing on the same basis. This is not to say that we are advocating additional subsidies of the private sector in the United States. On the contrary, we would much prefer to see total U.S. subsidy of the private sector held stable or even reduced. Even more importantly, we would like to see the subsidies of the private sectors in foreign countries reduced to the same level, expressed as a percent of the GNP, as exists in the United States.

Another problem is that U.S. tax law structurally discourages exports and encourages imports. We suggest that the U.S. tax system be structured in a manner that would not change total collections nor alter the net tax paid by citizens in various income brackets but which would eliminate the double taxation of U.S. products going overseas and the non-taxation of foreign products coming into the United States. Such an "equalization tax" would be levied on domestically produced products sold domestically, on products coming into the United States from foreign countries, and would be rebated to U.S. companies when their products leave the U.S. border. Such a system need not apply to every product. The additional revenues generated by the equalization tax would enable the reduction of other personal and business taxes proportionately so that the net taxes paid by both companies and individuals would remain the same. Such a tax could approximate net federal taxes paid on individual U.S. products and also could be indexed to the level of subsidization of products from another country.

As an example, an automobile manufactured in the U.S. which might hypothetically pay $1,700 in taxes (corporate, payroll, sales, etc.) would receive a rebate of that amount when it left the U.S. border. On the other hand, a similar foreign automobile coming in from Japan or another country would pay the same $1,700 plus a percentage based on the amount by which its foreign subsidy exceeded any U.S. subsidy on the same product (in this case, if net subsidies to Japanese auto producers amount to 15% of the value of the vehicle, while subsidies to U.S. producers amounted to 3%, there would be an additional 12% equalization tax on the value of the imported vehicle). If the subsidy of a foreign product was less than the subsidy of a U.S. product, they would receive a rebate.

If American industries are going to continue to compete in international trade, changes in our trade policy are absolutely essential. The federal government cannot afford to continue to rely upon private industry to protect its own interests under the existing system, given the complexity of the problems encountered and the enormous expenses that private industry is forced to absorb in order to have its complaint heard in each individual case. Major rethinking of our trade laws is necessary. We cannot allow our technological position to be further eroded.

Thank you.

STATEMENT OF ALLEN W. DAWSON, CHAIRMAN, SIECOR CORP.

Mr. Chairman, on behalf of Siecor Corporation, I would like to take this opportunity to address a subject which I know is of particular concern to you and to the Subcommittee on Trade. This subject deals with the practice of a number of our trading partners of targeting specific industries for special treatment in order to permit them to compete in world markets. I request that you include my remarks in the record of your Subcommittee's Hearings On U.S. Trade Remedy Laws.

INTRODUCTION

Modern industrial society is now experiencing a worldwide revolution in telecommunications technology centering around the emerging use of glass fibers in place of copper wires as the preferred medium of signal transmission. Optoelectronic telecommunications, which only a few years ago was regarded as little more than a theoretical possibility, is now a commercial reality in the United States with major installations already in place and even larger projects being planned for the future. The telecommunications industries of all major industrial nations are participating in this revolution and are attempting to develop and market fiber optic telecommunications systems on a worldwide basis. In several countries other than the United States, the development of fiber optic communications technology is being assisted through substantial government participation. The efforts of foreign producers of telecommunications equipment to enter the U.S. market while at the same time excluding U.S. producers from their own home markets presents a major problem for U.S. producers.

The purpose of this paper is to describe the growing market for fiber optic telecommunications equipment and the activities of foreign producers and governments with respect to that market. This statement will evaluate the threat which the activities of foreign producers and governments pose for U.S. producers of fiber optic telecommunications equipment and the need for an effective response by our government to those activities.

FIBER OPTIC COMMUNICATIONS

Most modern forms of communication from the telegraph and telephone to radio and television signals have involved the movement of an electric current through a wire or electronic impulses through the air. With the invention of the laser about 1960, the possibility of communicating with a beam light became theoretically possible and the opportunities opened by the use of light waves for communication were recognized as enormous.[1]

Light waves are a part of the spectrum of electromagnetic energy which is at the heart of all electronic signal transmission phonomena including electric current, radio waves, infrared radiation, visible light, ultraviolet radiation, x-rays, etc. The use of electromagnetic energy for communication began with the telegraph. From there engineers began the climb up the frequency spectrum starting with voice frequencies on telephone lines thence to radio, television and finally to microwaves which carry a broad range of modern electronic communications.

The capacity of waves of electromagnetic energy to carry communications signals is a function of their frequency or wavelength. The shorter the wavelength, the higher its frequency and the greater the range of usable frequencies for information channels. Existing communications systems (conventional telephone lines, radio and television) operate at frequencies between 10^2 Hertz (Hz) and 10^{10} Hz. State-of-the-art, high-capacity systems operating between 10^9 and 10^{10} Hz are being installed. Even with the increased capacity which these new systems provide, traffic growth for voice, data and picture transmission has been so rapid that saturation of these new systems is anticipated in the near future. To accommodate the growing demands on existing telecommunications facilities higher capacity systems operating at a frequency range approaching 10^{15} Hz are needed. Since these frequencies take us to the frequency range of visible light, the transmission of such energy waves requires an optical communication system.

The theoretical bandwidth capacity of an optical communications system is enormous. Light frequencies can carry 10,000 times more information than electrical signals on copper wires and 100 times more than coaxial cables.

The congestion facing state-of-the-art systems of communication, particularly telephone lines and microwave channels, created the incentive to develop the technology needed to exploit the transmission capabilities of light waves. One of the first problems encountered related to the medium need to transmit beams of light from point to point. Because light waves are so short, they are easily absorbed, scattered or blocked by dust particles and atmospheric conditions when transmitted directly through the air. Such direct communication through the atmosphere is impractical except for very specialized applications.

In 1966, Corning Glass Works received inquiries from the British Post Office regarding the feasibility of developing glass fibers capable of light transmission delivery at least 1 percent of transmitted energy at the end of 1,000 meters. At that transmission level, light signals transmitted through glass wires would travel as far without amplifying equipment as electrical signals do in copper cables while at the same time offering the possibility of additional performance advantages described above. Corning's response to these inquiries eventually resulted in the invention of a revolutionary new process for manufacturing "optical waveguides" made from glass fibers, making optical communications a practical reality. The technological breakthrough which made possible optical communications over glass fibers has been referred to by scientists as the most significant advance since the introduction of the transistor in the early 1950's.

The success of Corning's efforts in this endeavor has been remarkable. Starting with essentially all light lost in the 1966 state-of-the-art, steady improvement and invention lead finally to achieving the critical 1 percent output level in 1970. As so often happens once a technical barrier has been overcome, progress has continued to the point where state-of-the-art transmission has reached levels undreamed of a few years ago.

Today one optical communications fiber only .005 inches in diameter, about the size of a human hair, can replace cables several inches in diameter. In addition to the basic savings in material that this makes possible, there are even more significant benefits because of the properties of glass and light transmission. Because optical waveguides are made from glass, a completely dielectric (or non-metallic) conductor, they are practically impervious to interference from extraneous electromagnetic energy whether created naturally, such as in lightning bolts, or by other manmade electrical equipment or by way of cross-talk between lines in the same circuit or cable. By the same token, optical fibers do not radiate any energy to interfere with other equipment, or to be picked up deliberately by tapping.

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[1] "Communicating on a Beam of Light." Fortune magazine, March 1973, p. 1.

The market for fiber optic cables is growing and is expected to continue to grow dramatically during the next two decades as operators of telecommunications systems seek to take advantage of the unique properties of fiber optic communications. It is estimated that the U.S. fiber optic market alone will grow from $135 million in 1982 to over $2 billion by 1990.

SIECOR CORPORATION

Siecor Corporation (Siecor) is a Delaware Corporation, the ownership of which is equally divided between Corning Glass Works and Siemens Corporation.[2] Siecor manufactures, installs, tests and guarantees the performance of fiber optic cable used in optical communications systems. Siecor purchases glass fibers and incorporates those fibers in cables in order to permit the fibers to be installed in a variety of communications systems. Siecor produces a complete line of fiber optic cables that are compatible with all fiber optic telecommunications systems currently in use. Siecor has supplied fiber optic cable systems previously installed by a number of Bell System operating companies and various independent telephone companies including General Telephone and Electronics (GTE), Continental Telephone and United Telephone. In connection with these various installations, Siecor has collaborated as sub-systems supplier of cable with a number of optoelectronic telephone systems suppliers who produce other devices and equipment associated with fiber optic telecommunications including signal transmission, boosting and reception devices. Siecor has become a fully qualified, competitive and efficient domestic supplier of fiber optic cable and ancillary equipment and services. Siecor has invested and continues to invest in optical cable manufacturing equipment for its Hickory, North Carolina plant and strives to maintain its position as a strong domestic subsystems supplier of fiber optic cable to the domestic telecommunications industry.

THE EXPERIENCE CURVE PHENOMENON

In order to participate in the growing market for fiber optic communications, companies like Siecor must participate fully in the early development, production and installation of fiber optic equipment. Those who are not able to participate in the early stages of this emerging market will not benefit from the wellknown "experience curve" phenomenon. It is most unlikely that such firms will be able to compete successfully over the long term with low-cost suppliers who win the race down the learning curve. Since the "experience curve" phenomenon is so crucial to success in any emerging high technology industry, some additional explanation of how the experience curve worker would be useful.

The "experience curve" phenomenon was first reported by the Boston Consulting Group in 1966. Simply stated, the learning curve phenomenon teaches us that the "[c]osts of value added decline approximately 20 to 30 percent in real terms each time accumulated experience is doubled." [3] The cost reductions reflected in the experience curve are the result of a combination of learning, specialization, investment and scale.[4] The experience curve affects all manufacturing business but its impact is especially great in new businesses where the doubling of cumulated units of production (2, 4, 8, 16, 32, 64, etc.) with the resulting decline in cost occurs more frequently.

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[2] Corning Glass Works (Corning) is a corporation organized under the laws of the State of New York whose shares are publicly traded on the New York Stock Exchange. Corning manufactures specialty glassware including a wide range of products used in the electronics industry. Corning is a major supplier of optical communications fibers.

Siemens Corporation, a Delaware corporation, is a holding company 100 percent owned by another Delaware Corporation, Siemens Capital Corporation. Siemens Capital Corporation is in turn owned by Siemens A.G. of the Federal Republic of Germany. Siemens Corporation controls the activities of 14 separate U.S. corporations approximately 60% of the sales of which are generated by U.S. manufacturing operations.

[3] The Experience Curve—Reviewed, I. The Concept, The Boston Consulting Group, 1973.

[4] The Experience Curve—Reviewed, III. Why Does It Work?, The Boston Consulting Group, 1973.

There are several very important business implications of this principle, including the following:

Costs are inversely proportional to market share. High market share should produce low costs.

Relative costs over other producers should improve if growth of production is faster than that of the competition.[5]

The total amount of operational optical fiber installed in the United States as of year end 1982 was approximately 100,000 km. Presently planned additional facilities will result in the installation of an additional 500,000 km by the end of 1985.

The reduction in cost which will result from an excursion down the learning curve during this period will be significant and could place those firms who participate in this expanding market at a considerable cost advantage over those who do not.

TARGETED INDUSTRIES POLICIES

The experience curve phenomenon is a concept well known to many of our trading partners who have adopted national policies to promote the development of certain industries and who actively promote and encourage the export of the products of those industries to world markets. Indeed, the so-called targeted industry policies of our trading partners seem specifically designed to permit the targeted industry to develop the production volume and associated cost efficiencies needed to achieve dominance over foreign competitors. The term "targeted industries policy" has come into vogue in recent years to describe what has been a classic approach to attempted control of world markets. There are four elements which are usually associated with a targeted industries policy:

1. Encourage the development of technology through generous government-subsidized and coordinated research and development;
2. Permit the targeted industry to become established in a protected home market;
3. Encourage the installation of advanced production equipment through low-interest loans and grants in order to provide a production base with a capacity far in excess of anticipated home market demand; and
4. Promote sales on world market at whatever price is necessary to utilize capacity, achieve economies of scale and race foreign competitors down the experience curve.

The first step in a typical targeted industries policy is to encourage the development of technology through generous government subsidies. This step is especially important in high technology, knowledge-intensive industries where someone else has made an initial technical breakthrough (as in the case of fiber optics) and members of the targeted industry are forced to catch up with the technical leader.

During the period in which the targeted industry is establishing its technological base, it is permitted to grow in a protected home market. At the early stages of a targeted industry's development, the exclusion of foreign competition insures that the favored industry will not be undercut by lowcost foreign producers and that it will be able to develop sufficient volume to start reducing its own costs of production. In the later stages of a targeted industry's development, the higher home market prices made possible by the protected environment permit the industry to bankroll its assault on foreign markets at whatever price is necessary in order to buy market share and build additional volume.

In order to prepare them for an assault on world markets, targeted industries are frequently given subsidies, low-interest loans and favorable tax treatment in order to encourage them to install a highly efficient production base with a capacity far in excess of home market demand. Once this production capacity is in place, the targeted industry has every incentive to promote sales on world markets at whatever price is necessary in order to utilize capacity, achieve economies of scale and race foreign producers down the experience curve. The entire strategy is designed to insure that the targeted industry becomes the high-volume, low-cost supplier who will eventually dominate the market.

THE NEED FOR A STRONG U.S. GOVERNMENT RESPONSE

American firms who are in industries targeted for special treatment by our trading partners find themselves in the unenviable position of having to compete against the resources of sovereign states. Under such circumstances one would expect to get some sympathy and perhaps even some cooperation and assistance from our own government. Unfortunately, such has not always been the case.

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[5] *Id.*

The policies of our federal government during the 1970s reflect a fundamental lack of understanding of the problem presented by the targeted industries policies of our trading partners. During the 1970s while the Government of Japan was targeting its computer and semiconductor industries for favored treatment by way of subsidies, coordinated R&D, and a protected home market, the Department of Justice was targeting IBM and AT&T for dismemberment under the antitrust laws. Thus, while the Government of Japan was attempting to build up its high technology industries of the future for world conquest, our government was taking action which would weaken our strongest contenders in the markets of the future.

It is no secret that a number of high-technology, knowledge-intensive industries have been targeted for special treatment by the Government of Japan as well as by the governments of some of our other major trading partners. A recent Commerce Department study has identified a number of targeted industries, including the computer, semiconductor, fiber optic, aircraft, biotechnology, pharmaceutical, industrial robotics and machine tool industries.

Siecor is concerned because the fiber optics industry has been targeted for special treatment by a number of our trading partners including the Government of Japan, a government which has experienced considerable success in this sort of activity. Consider the following facts related to the Government of Japan's activities in fiber optics:

1. Protected home market

The Japanese home market for fiber optics communications equipment has been protected from outside competition by preventing foreign-owned manufacturers from producing in Japan and by excluding foreign-produced products from the market. Despite repeated attemps beginning as early as 1975, Corning Glass Works was denied opportunities of establishing an equity position in manufacturing fiber optics in Japan. Initially access was denied because NTT said it would not purchase from a foreign firm and government and industry firms feared that Corning's commanding technical lead could not be overcome under conditions of direct competition. Subsequently, NTT and three Japanese firms cooperated in the development of optical fiber technology. Closing upon Corning's technical lead, there is now no desire to offer any outsider an equity participation.

NTT is just now starting to procure small quantities of high-technology communications equipment from non-Japanese sources. There have been no purchases of fiber optics outside of Japan in the past seven years.

2. Government-subsidized and coordinated research and development

Fiber optic producers in Japan are presently benefiting from a number of government-sponsored programs designed to promote the technical capabilities of those firms in the field of fiber optics. Those programs include:

Joint R&D coordinated by MITI and other governmental agencies, and

Government subsidies for the encouragement of private R&D.

An article in the *Japan Times* of September 27, 1982 estimated that MITI has supported R&D in fiber optics to the tune of ¥46 billion, about $200 million.

3. Installed capacity far exceeds anticipated home market demand

The Japanese press estimates that manufacturers of fiber optic cable have installed capacity to produce 240,000 kilometers of optical fibers per year. Our own private estimates lead us to conclude that these accounts do not overstate actual production capacity. It is anticipated that Japan's 1983 home market demand for optical fibers will be 40,000 kilometers, or less than one-sixth of the installed capacity.

4. Incremental Price on World Markets

Published accounts by Nippon Telegraph and Telephone (NTT) establish that in 1982, it purchased 588 km of optical fiber cable for $18 million. Since each cable contained 10 fibers, NTT purchased approximately 6,000 km of fiber. This works out to an average price of $3.00 per cabled fiber meter. During 1982 prices in the United States and Canada were well below $1.00 per meter of cabled fiber and Japanese firms were offering to sell at prices at or below the prevailing United States and Canadian prices.

All of the classic signs are here—a protected home market, cooperative efforts between government and chosen Japanese firms, government financial assistance, excess manufacturing capacity, and home market prices which allow incremental pricing to achieve exports.

It is only natural that American firms are apprehensive. Naturally, Siecor would enjoy the opportunity to sell cable to NTT at $3.00 per fiber meter. This would permit Siecor to earn enough money in Japan to be able to compete effectively against Japanese companies when they come into the U.S. market and undercut U.S. prices. Unfortunately for Siecor, this is definitely not what the Government of Japan (which runs NTT) has in mind. It is clear that NTT pays generous prices to Japanese producers of fiber optic cable to enable those producers to sell at low prices outside of Japan. Since the cost of cable to NTT is passed on to the Japanese people in their telephone bills, the generous prices paid are nothing less than subsidies to Japanese producers.

Japanese participation in the U.S. market for optical communications poses two serious problems for U.S. producers. First, the volume base for American firms is undercut and their ability to travel down the experience curve as fast as their overseas competitors is impaired. Remember, the winner of the race down the experience curve will be the high-volume, low-cost producer of the future. Second, price undercutting by foreign producers in the U.S. market prevents domestic producers from earning the kind of returns which are needed in order to fund additional R&D and invest in the most advanced and efficient production equipment. Participants in high-teachnology industries like fiber optic communications must be in a position to invest in R&D and advanced production techniques or they will soon be surpassed by others who do.

U.S. firms who participate in targeted industries must be prepared to respond to this type of threat. There are two elements which any rational response to the targeted industry policies of our trading partners must possess. The first element deals with the effort which private corporations must undertake to provide high-quality, competitively priced products that are carefully designed to meet the needs of the customer. U.S. firms must have a genuine commitment to quality and excellence in their product offerings.

The second element of any response deals with action by the U.S. Government to address conduct by foreign governments and companies which unfairly prejudices U.S. firms. American companies in targeted industries are being forced to compete against sovereign states. Few, if any, private companies can compete successfully under these circumstances without some intervention by our federal government.

There are five elements which should be incorporated in any strategy designed to blunt the targeted industry policies of our trading partners:

1. Make every effort to compete with the targeted industry in its home market. Under no circumstances should the targeted industry be permitted to subsidize low-priced exports by means of artifically high prices in a protected home market.
2. Compete vigorously in all major world markets. Do not permit the targeted industry to become the high-volume, low-cost producer by virtue of uncontested exports to third countries.
3. Contest any effort by firms in targeted industries to sell subsidized products in the U.S. market or to sell products here at less than fair value. Insist that the federal government enforce the countervailing duty and antidumping laws vigorously.
4. Urge U.S. Government trade policy officials to insist on reciprocal market access with respect to targeted industries. The U.S. is the largest and most lucrative market in the world. Restricting access to this market when there is no reciprocal access in a foreign market is potent weapon, the value of which should not be underestimated.
5. Urge the United States Trade Representative to conduct a thorough review of individual targeted industries policies of our trading partners to determine whether such policies are consistent with obligations undertaken by contracting parties to the GATT. Encourage the President to take appropriate unilateral action to terminate practices which burden or restrict U.S. commerce if foreign governments do not honor their GATT obligations.

Implementation of this strategy will not be easy. In some cases our domestic laws must be amended to provide speedier and more certain forms of trade relief. Perhaps the greatest problems will be to convience the federal government that it must deal with targeted industries policies of our trading partners firmly and resolutely.

It is unrealistic to assume that the challenge posed by targeted industries policies will be blunted successfuly in a single action or over a short period of time. The struggle for the high technology markets will require persistence, determination and the will be persevere over the long haul. It is clear, however, that U.S. companies in high-technology industries that have been targeted for special treatment by foreign governments are vulnerable and that a coordinated government/industry response to this threat is essential.

Mr. Chairman, I appreciate the opportunity of expressing these views to the Subcommittee on Trade. I would be pleased to work with Subcommittee further in order to develop and evaluate potential legislation aimed at dealing with the problem of targeting.

STATEMENT OF RICHARD DEC. HINDS* ON BEHALF OF THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION

The Synthetic Organic Chemical Manufacturers Association ("SOCMA") welcomes this opportunity to submit this statement in connection with the Subcommittee's hearings on trade remedy laws. SOCMA is a nonprofit association of producers of organic chemicals. A membership list is attached.

SOCMA believes that changes are needed in the U.S. antidumping duty laws relating to state-controlled economy countries. The present provisions do not adequately reflect the changes that have occurred in the economies of the United States' trading partners, and do not afford an efficient and predictable procedure for handling antidumping cases involving state-controlled economies such as China. In addition, the application of the U.S. countervailing duty laws to artificial pricing of feedstocks and other inputs by state-owned or state-controlled entities needs to be clarified.

A. Introduction

The U.S. antidumping laws are designed to provide an effective remedy to domestic industries injured by unfairly priced imports. To obtain relief, it is necessary to show that imported merchandise is sold at "less than fair value" (LTFV), which in general means that the merchandise is sold in the U.S. market for less than in the "home market" (or, in the absence of sufficient home market sales to make a meaningful comparison, in a third country market). It is also necessary to show that an industry in the United States is "materially injured" or threatened with material injury by reason of the LTFV imports.

It obviously is difficult to determine whether sales are being made at LTFV if the merchandise in question is exported to the U.S. from a country in which "home market" prices of the merchandise are not freely determined by the forces of supply and demand. If the prices charged for merchandise in the home market are controlled by the government, then those prices cannot be assumed to represent the "fair value" of the merchandise, and cannot be compared with the price charged for such merchandise in the United States to determine whether the merchandise is being dumped on the U.S. market. The government might keep prices of the merchandise in the home country artificially low in order to promote domestic industrial or agricultural policies. In such a case, the U.S. price of the merchandise, even if set higher than the home market price, still might be less than the "fair value" of the merchandise.

Recognizing that antidumping provisions geared to free-market economic systems will not be effective where home market prices are state-controlled, Congress in 1974 added special provisions to the antidumping laws to apply in such cases. Under these state-controlled economy ("SCE") provisions, the Commerce Department is directed to determine the foreign market value of the allegedly dumped merchandise by referring to the price at which such or similar merchandise produced by another foreign country that has a non-state-controlled economy (a "surrogate country") is sold.

B. Problems with the current SCE import provisions

1. The "surrogate country" procedure.—Unfortunately, the SCE antidumping provisions have proven very difficult to implement in practice. For one thing, the necessity of using a "surrogate country" to compute the foreign market value, and thus the dumping margin, involves a host of complexities, and it results in determinations that are not predictable by either the exporter or the U.S. industry.

For example, in "Truck Trailer Axle-and-Brake Assemblies From the Hungarian People's Republic," 46 Fed. Reg. 46152 (1981), the Commerce Department used Italy as a "surrogate country" for Hungary in reaching a 68.1 percent preliminary LTFV margin (the case was settled before a final determination was made). The Department justified this large margin on grounds that there were "gaps" in the information it had received from the Italian producer.

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More recently, in a preliminary dumping determination by the Commerce Department in "Greige Polyester/Cotton Printcloth from the Peoples Republic of China". 48 Fed. Reg. 9896 (March 9, 1983), the Commerce Department used Thailand as a "surrogate country" in reaching a 23 percent weighted-average preliminary dumping margin on imports of that article.

The results in antidumping investigations such as these are unpredictable. Neither the domestic industry nor the foreign exporter can be certain what "surrogate country," and thus what prices, the Commerce Department will use in determining whether products are being dumped on the U.S. market. because the domestic industry cannot determine the extent of relief which it could obtain (at considerable cost), the current rules discourage the domestic industry from filing petitions for relief. Furthermore, in the absence of any clear benchmarks, an SCE country cannot determine with any precision what price levels will avoid dumping charges. There is therefore little inducement to raise prices above the levels selected to meet export sales targets.

We believe the antidumping rules should be amended to replace the "surrogate country" provisions with a more predictable and administratively practicable means of determining foreign market value in such SCE cases. Our specific proposal is discussed below in Part C.

2. The problem of a non-state controlled sector in a generally state-controlled economy.—A further difficulty with the present SCE antidumping provisions is that it is unclear whether they are applicable to situations in which the merchandise under investigation is exported from a country whose economy is in general state-controlled, but produced by an entity operating in a non-state-controlled sector of that economy. In recent years, the economies in many communist and socialist countries, which the SCE antidumping provisions were designed to deal with, have become "mixed": some sectors of those economies operate in most or all respects on the basis of free-market principles, with prices of goods established by the forces of supply and demand.

For example, in "Natural Menthol From The People's Republic of China", the first antidumping case involving exports from that country, the PRC exporter argued that the production and sale of menthol in the PRC is essentially free from state control. The petitioner argued that the SCE provisions were applicable whenever a determination is made that the economy of the country generally is state-controlled (46 Fed. Reg. 3258 (1981)). The Commerce Department determined that natural menthol was subject to very little direct regulation in the PRC and that purchases and sales of menthol there essentially are based on market considerations.

However, the Department still applied the SCE provisions because (i) land and labor, the primary factors in the production of menthol, were not bought and sold in a genuine market and (ii) the pervasiveness of state planning and control of major agricultural products "distorts the incentives that would be developed by a freely operating market" (47 Fed. Reg. at 3259). It was thus unnecessary for the Department to decide the issue posed by the parties because it found that the degree of control exercised by the state over the PRC economy generally as well as over the production and sale of menthol in particular were sufficient to result in an SCE determination regardless of which interpretation of the statute was adopted.

We believe this issue should be resolved by amending the SCE provisions to state that they shall be applied on a sectoral basis. As discussed more fully in Part C below, for administrative reasons we also propose creating a rebuttable presumption that the SCE provisions are applicable to all economic sectors of countries whose economies are generally state controlled. If a sector of such a country is in fact free from state control it should be permitted to offer evidence to that effect. If the Commerce Department is satisfied that home market prices (or in certain situations third market prices) were freely determined on an open market, it should apply the normal antidumping rules.

3. The problem of the state-controlled sector in a generally non-state-controlled economy.—Requiring the SCE antidumping rules to be applied on a sectoral basis also would solve the related question of whether the SCE antidumping provisions can be applied to a case involving merchandise produced by a company that operates in a generally non-state-controlled economy country but that is in fact itself state-owned or state-controlled in its pricing of that merchandise. For example, it is unclear under current law whether dumping by a government-owned petrochemical plant in a country having a generally free market economy (e.g., Mexico) should or could be handled under the existing SCE antidumping provisions. We believe it

would be appropriate to handle such a case under revised SCE antidumping rules if the petrochemical sector of the country's economy were state-owned or state-controlled. The need to have effective remedies for such unfair trade actions is a matter of increasing importance to the U.S. chemical industry because of the development in several energy-rich nations of substantial government-owned petrochemical plants. See USITC Report No. 83-028 entitled "The Probable Impact on the U.S. Petrochemical Industry of the Expanding Petrochemical Industries in the Conventional-Energy-Rich Nations."

The application of the U.S. countervailing duty laws to state-owned or controlled entities in non-state controlled economies also is unclear under current law. Those laws are designed to protect domestic industries from imported articles receiving subsidies from foreign governments. The present countervailing duty provisions do not, however, specifically address the situation where a company producing an article for export to the United States receives inputs for that article from a state-owned or state-controlled entity, at a price that does not reflect the free-market value of the input. They leave the computation of the subsidy in such cases largely to the discretion of the Commerce Department. Furthermore, the Department has been highly innovative in avoiding the imposition of countervailing duties in such cases. For example, in a number of recent cases the Department ruled that a subsidy that a government makes available to all industries is not countervailable under U.S. law. See "Anhydrous and Aqua Ammonia from Mexico", 48 Fed. Reg. 10395 (March 11, 1983); "Certain Softwood Lumber Products from Canada" 48 Fed. Reg. 14729 (April 5, 1983). In light of the increasing number of "mixed economies," in which governments control some sectors of national economies, the countervailing duty laws should be amended to provide some clearer rules of decision in those cases.

C. Proposed amendments to SCE import provisions

The U.S. import laws should be amended to deal adequately and fairly with unfair trade practices by state-owned or controlled entities. Specifically, the SCE provisions of the antidumping laws should be revised (i) to avoid the difficulty and unpredictability of the "surrogate country" procedure and (ii) to reflect the development of mixed economies.

To achieve the second of these two goals, the SCE provisions should be amended to provide explicitly that they are to be applied on a sectoral basis rather than on a country basis. That is, in making a determination whether the SCE antidumping rules should be applied in a particular case, the Commerce Department should examine the relevant sector of the economy of the country from which the allegedly dumped goods are imported to the United States. If that sector is predominantly state-controlled, the SCE antidumping provisions should be used; if the sector is not predominantly state-controlled, then the regular antidumping provisions should be used.

The petitioning party would normally have the burden of establishing that the sector of the country from which the goods were exported was state-owned or controlled. However, in order to reduce the burden on petitioners and the administrative load on the Commerce Department in making determinations under tight timetables, the SCE rules should create a rebuttable presumption that the SCE provisions shall apply in any case involving a country appearing on a list of countries that the Commerce Department has determined have generally state-controlled economies. The presumption could be rebutted if the exporter(s) of the merchandise in question can establish that the price of the merchandise sold in the home market is freely determined on an open market by the forces of supply and demand or, if there are insufficient home market sales, that the merchandise is sold in a third country at prices freely determined on an open market by the forces of supply and demand.

In order to solve the problems regarding the "surrogate country" rules, the SCE provisions should be amended to replace the "surrogate country" analysis with a more workable procedure. Our preliminary assessment is that the fairest, workable approach is to have the foreign market value of a product from a state-controlled sector determined in most cases by reference to the lowest average price in the United States of a like product produced in a non-state-controlled sector in another country. In other words, the lowest average price in the United States would be the "surrogate" for the foreign market value of such merchandise. However, if the petitioning industry demonstrates that the merchandise is being sold in the United States at prices below the foreign cost of production, a constructed value approach to defining foreign market value such as that found in existing law should be used. Under existing law, the foreign market value in such cases would be equal to the cost of production in the country of exportation plus amounts for overhead (not less than 10 percent of cost of production) and profit (not less than 8 percent of total cost). The difficulties encountered in obtaining reliable cost data from foreign government-controlled entities may suggest the need to provide some alternative approaches to constructed value, but we do not at this time have any specific recommendations.

More specifically, we suggest that consideration be given to amending the SCE provisions to read as follows:

Whenever the Commerce Department finds that, because of state ownership or control, merchandise under investigation is not sold either in the home market or in any other country other than the United States at a price that is freely determined on an open market by the forces of supply and demand, the foreign market value of that merchandise, for purposes of determining whether sales were being made at LTFV, would be defined by one of the two following methods:

(a) The lowest average price in the United States of like merchandise produced in a country that the Commerce Department determines to be an appropriate country for comparison (which may be the United States but must not be the country in which the products under investigation were produced), adjusted for differences in quantity, level of trade, duties, or other differences in circumstances of sale, and for differences in price which the Commerce Department determines are appropriate to reflect verifiable differences in the cost of production in the country of exportation and the appropriate free market country. A country would be an "appropriate country for comparison" if:

i. Like merchandise from that country is sold in the United States in quantities comparable to those in which the merchandise under investigation is sold;

ii. That country is not on a list to be maintained by the Commerce Department of countries, and sectors of countries, determined not to have free market economies or sectors of economies (provided, however, that such a determination with regard to a particular country or sector could be rebutted by the respondent foreign exporter or U.S. importer upon a showing that such or similar merchandise is sold or offered for sale within that country at prices which are freely determined on an open market by the forces of supply and demand);

iii. No preliminary or final determination has been made that a subsidy, bounty, or grant is being provided with respect to such merchandise from that country, or that such merchandise from that country is being, or is likely to be, sold in the United States at less than fair value.

(b) The constructed value, as defined in section 773(e), if the merchandise is sold in the United States over an extended period of time and in substantial quantities at less than the cost of production in the country of exportation.

For purposes of these provisions state control would be determined by reference to criteria including the following:

(a) The merchandise is sold in either the home market or export markets at prices determined by the government of the country of export; or

(b) The government determines the price of significant factors of production including labor rates, energy, and raw materials.

These procedures for making LTFV determinations in cases involving state-owned or state-controlled entities also could be used to clarify the application of the U.S. countervailing duty provisions to situations in which state-owned or state-controlled entities sell raw materials or other inputs such as energy to companies at prices that do not reflect the free-market value of the inputs, so-called "downstream dumping." The countervailing duty laws should provide that a countervailable subsidy is supplied by a foreign government if any input used in producing merchandise exported to the United States has been provided to the producer of that merchandise by a state-owned or state-controlled entity at less than fair value. The amount of the subsidy would be computed by determining the difference between fair value as defined in the SCE antidumping rules described above and the price at which such input has been sold or otherwise provided by a state-owned or state-controlled entity.

Thus, for example, a countervailing duty could be inposed on a petrochemical import if natural gas used in producing the petrochemical were sold by a government-owned entity to the company producing the petrochemical at a price below the free market price for natural gas. If natural gas were not sold at home or in third countries in a free market then the free market price would be determined under the SCE antidumping rules proposed above (i.e., generally the lowest average price in the U.S. market). The U.S. industry would therefore be protected against artificial pricing of products by state-owned or state-controlled entities regardless of whether the products were dumped directly on the U.S. market or "dumped" indirectly on the U.S. market as an input used in producing the article sold in the United States.

D. Conclusion

Amending the current SCE antidumping provisions along the lines described above would benefit the U.S. industry, foreign producers and importers, and the government agencies charged with administering the antidumping laws. Specifically, such rules would both (i) provide a fair and workable method of determining whether LTFV sales are being made in the United States by a foreign company operating in either a "mixed" or a totally state-controlled economy, and (ii) make the administration of the antidumping laws in these situations simpler, more effective and predictable.

In addition, amending the countervailing duty provisions as described above would bring them into line with current economic reality. Making them applicable where a state-owned or state-controlled entity sells inputs at prices not freely determined on an open market by the forces of supply and demand would assure that such a state-owned or state-controlled entity could not "dump" products in the United States indirectly by selling them to companies for use in producing merchandise exported to the United States.

Both of these amendments are needed now, but they will be of increasing importance to the chemical industry in the future as energy-rich countries continue to develop their petrochemical industries through state-owned or state-controlled entities.

STATEMENT OF GARY CLYDE HUFBAUER, ON BEHALF OF STROHMEYER & ARPE CO., INC.

Introduction

This statement is submitted on behalf of Strohmeyer & Arpe Company, Inc., the sole U.S. importer of montan wax produced in the German Democratic Republic (GDR, also known as East Germany). Montan wax, while a small item in international trade, illustrates the larger difficulties inherent in the artifical pricing concept of S. 958, introduced by Senator Heinz during the 97th Congress and a subject of consideration by this Subcommittee.

A brief description of montan wax will help set the stage. Montan wax is extracted from lignite of a special quality, and nature has deposited most of that lignite in the GDR. Thoughout the western world, the only other commercial producer of montan wax is ALPCO, a U.S. company. ALPCO produces montan wax from lignite that contains much less wax than the GDR lignite. ALPCO also uses far more costly energy in its extraction process. Principally for these reasons, ALPCO is a higher cost producers than the GDR.

Because of its cost disadvantage, ALPCO sought relief against imports of GDR montan wax under both the antidumping and market disruption provisions of U.S. trade law. In both instances, after exhaustive and spirited proceedings, relief was denied.

How would this case have fared under S. 958? An examination of the probable outcome is instructive.

The puppet monopoly problem

As presently drafted, S. 958 would ultimately give ALPCO monopoly control over the price of montan wax sold in the United States. Any price that ALPCO chose to set would have to be followed by the GDR, to the detriment of U.S. consumers.

Let me explain this problem. Since the GDR and ALPCO are the only commercial producers of montan wax in the western world, the artificial pricing standard in S. 958 would lead to an intolerable result: if GDR wax was sold in the United States at a lower price than ALPCO wax, ALPCO could petition and obtain a dumping duty to the extent of the price difference. Foreseeing this outcome, the GDR would simply set its prices by reference to ALPCO's prices. The GDR would become a "puppet monopoly" of ALPCO.

This monopoly pricing result would not differ a great deal if a third firm, located say in France, also produced montan wax. In that event, S. 958 would hold the GDR to the prices of the French producer. The only difference between the two situations is that, in a two-producer market, the U.S. producer would make the GDR its "puppet monopoly", while in a three-producer market, a foreign firm would control the "puppet monopoly".

This outcome radically departs from the original concept of the antidumping law. The consequences of this departure go far beyond montan wax. The antidumping law was designed to curb price discrimination between domestic and foreign sales and to prevent nations from exporting goods in which they do not have a competitive advantage, as shown by a comparision between prices and costs. Conversely, the law was designed to permit nations to export goods in which they do have a competitive advantage. The law was not designed to make a foreign exporter the price slave of his U.S. or third-country competitor.

One of the strong arguments for S. 958 is that the Department of Commerce needs a simple alternative to antidumping procedures now applied to nonmarket economies. Administrative simplification has much to commend it. Later in this submission, I will offer several suggestions for simplification. However, simplification should not be pursued in a way that leads to unwitting creation of puppet monopolies.

Ambiguity in the definition of the price standard

Under S. 958, the "lowest free market price" serves as the benchmark for determining whether the nonmarket country is dumping, and if so, the dumping margin. As presently drafted, S. 958 does not clearly set forth how the "lowest free market price" is to be calculated. The Department of Commerce is given considerable latitude to choose an "appropriate free market country" and to aggregate the prices of several producers or use the price of only a single producer in that country. My concern is that this discretion might be used in a way that would unfairly limit the nonmarket country's ability to use price competition as a legitimate marketing tool. In order to avoid this danger—assuming that S. 958 goes forward—I would suggest that the "lowest free market price" be defined as the lowest representative price charged in any free market country (adjusted for differences in quantity and so forth).

Even with this clarification, the "lowest free market price" benchmark carries the implication that any nonmarket producer that undersells its U.S. or foreign competitors must harbor a secret intent to drive them out of business. The predicate for this suggestion is that underselling is somehow underhanded. In reality, underselling is part of the "magic of the market." Underselling is a time-honored device for a new firm to capture a share of the market. Underselling is also used by established firms to ward off competition from substitute products.

The price benchmark approach embraced is S. 958 brings to mind such discredited practices as the old American Selling Price tariff and the European Economic Community's variable levy. These various price benchmark statutes all have one feature in common: they introduce or invite price rigidity in a manner calculated to defeat competitive advantage and to penalize efficient producers.

Is S. 958 necessary?

S. 958 is not needed to answer emergency circumstances. Other laws already allow the U.S. Government to defend our national security, to make a political statement by limiting exports, and to respond to the harmful impact of imports. Among such laws are the Export Administration Act of 1979, the National Security Amendment (§ 232 of the Trade Act of 1962), and the "escape clause" (§ 201 of the Trade Act of 1974). In addition, the "market disruption" provision (§ 406 of the Trade Act of 1974) was devised with special reference to the nonmarket countries.

The rationale for S. 958 is not emergency circumstances. Rather it is the burden of administering the present anti-dumping law. In order to evaluate this rationale, a brief review of present antidumping law, as applied to nonmarket countries, may be helpful.

Background of antidumping law

The present law and regulations governing antidumping petitions filed against products from state-controlled economy countries evolved slowly over two decades. The traditional standard for establishing the existence of dumping is to compare foreign market value (i.e. the price at which the foreign merchandise is sold for home market consumption or for export to third countries) with the U.S. price (i.e., the price at which the foreign merchandise is sold to the United States).

The first departure from the traditional comparison in a dumping case that involved a state-controlled economy country occurred in "Bicycles from Czechoslovakia," 25 Fed. Reg. 6,657 (1960). In this case, the Treasury Department did not use Czechoslovakia home market prices or export prices, or even the constructed value in Czechoslovakia, to establish foreign market value. Instead, a "third-country" test was applied based on the price of similar merchandise produced in a non-state-controlled economy country. This approach came to be known as "surrogate country" analysis. Surrogate country analysis represents one step in the right direction and one step in the wrong direction. The step in the right direction was to calculate foregin market value on the basis of conditions in a market country that resembles, in its broad economic contours, the nonmarket nation. The step in the wrong direction was to use the actual prices of a competing third country producer, thereby opening up the possibility of a "puppet monopoly".

The de facto use of surrogate country analysis applied in Bicycles was codified by Treasury regulations in 1968. Regulation § 53.5, T.D. 68-148, 2 Cust. Bull. 307 (1968). The 1968 regulation was substantially adopted by Congress in the Trade Act of 1974, § 321(d), 19 U.S.C.A. § 164(c) (1976). This change was accomplished by the addition of § 205(c) to the Antidumping Act of 1921.

The Senate Finance Committee Report on the 1974 Act, S. Rep. No. 1298, 93rd Cong., 2nd Sess. 1974, went a step further and suggested that the new section would allow the use of domestic United States prices as a determinant of foreign market value "in the absence of an adequate basis for comparison using prices in other non-state-controlled-economy countries."

There is no evidence that the Treasury used domestic United States prices as a determinant of foreign market value prior to 1974. In any event, the Treasury amended its regulations in 1976 to stipulate that United States prices could be used. 41 Fed. Reg. 26,203 (1976). The use of United States prices was another step in the wrong direction, for it could lead almost automatically to a finding of dumping no matter what the competitive advantage of the nonmarket producer. After all, the U.S. producer—whose prices would be used to establish foreign market value in the absence of any third country producer—would only file a dumping petition if he was being undersold by the nonmarket producer.

This weakness was exposed in "*Electric Golf Cars from Poland,*" 40 Fed. Reg. 5,383 (1975). That case was a prime catalyst in the adoption of the 1978 amendments to the Treasury regulations, 43 Fed. Reg. 35,262 (1978). In the *Golf Cars* case, after a Canadian producer went out of business, a mechanical reading of the 1976 regulations might have forced the Treasury to rely upon U.S. prices in determining the foreign market value of Polish golf cars. The result would have been a sure, and unfair, finding of dumping.

In its amended regulations the Treasury established the following hierarchy of approaches for establishing a surrogate country foreign market value:

(1) the price at which such or similar merchandise of a non-state-controlled economy country is sold in its home market or for export;

(2) the constructed value of such or similar merchandise in a surrogate non-site-controlled economy country;

(3) the price or constructed value determined from any market economy country other than the United States; or

(4) the price or constructed value determined by sales or production of such or similar merchandise in the United States.

Of these methods, the approach that best carries out the original intention of the antidumping laws is the second, namely the constructed value in a surrogate non-state-controlled economy country. The constructed value approach was employed in both the *Golf Cars* and the *Montan Wax* cases. The constructed value method starts with the quantities of physical factors of production used in the nonmarket economy to manufacture the merchandise under investigation. The constructed value method then uses data from the surrogate economy to establish unit costs for those physical factors. A constructed value analysis makes an honest attempt to estimate the costs, and therefore the competitive advantage or disadvantage, of the nonmarket producer.

The 1978 amended regulations also provided guidelines for selecting a surrogate country that best resembles the state-controlled economy country. The Department claimed that past surrogate country selections had, as a matter of practice, focused on "a country that is most like the exporting country." 43 Fed. Reg. 35,263 (1978). The Department noted, however, that the standard had not been clearly articulated and the 1978 regulation sought to "provide such a standard." Id.

Prior to the 1978 amendments, the Treasury normally selected a West European country using a pool of criteria, including GNP per capita, geographic proximity, the level of industrial development, and so forth. The 1978 regulations were intended to create greater certainty in the selection of a surrogate country by placing greater weight on GNP per capita and similarity of industrial development as deciding characteristics. Unfortunately, the 1978 changes have not yet resulted in the publication of a list of preferred surrogate countries by the Commerce Department.

Problems in the antidumping law

Foremost among the problems in the present antidumping law, as it applies to East-West trade, is the use of the price of such or similar goods sold by market economy countries to obtain the fair market value of the nonmarket producer. The prices of a third country producer may bear no relationship to the costs of the nonmarket country producer. Even worse, this procedure enables a third country producer to set a floor on the prices charged by the nonmarket economy country. Any competitive advantage that the nonmarket producer has may be washed away in this "Alice in Wonderland" exercise. S. 958 would simply enshrine this approach in all cases and eliminate the conceptually better approach of using constructed value. Instead of the constructed value approach, S. 958 would require that the nonmarket producer be held to a benchmark of the "lowest free market price". The result would be a conceptual mismatch between the benchmark price and the actual costs of the nonmarket country. As noted earlier, in cases in which the only market producer is a U.S. firm, the law would guarantee the U.S. producer a "puppet monopoly".

In addition, there are probably many cases in which goods are sold in the U.S. market by a nonmarket producer, by a single (or very few) U.S. producers, and by higher-priced free market producers abroad. In these cases, the U.S. producers could force the nonmarket producer to increase his price at least to the level of the lowest price of nonmarket producers.

In short, S. 958 would, in some cases, foster a kind of administered price-fixing that runs directly contrary to U.S. notions of competition and to the spirit of U.S. antitrust laws. As a result of the conceptual mismatch problem and the puppet monopoly danger, we recommend that constructed value should be the preferred option in all cases involving goods from nonmarket economy countries.

One objection to the use of constructed value is the argument that it is hard to find a surrogate country for each nonmarket country. Of course, no two countries are the same, and it is almost impossible to find a "perfect match" between a market economy and a state-controlled economy. But it is not so difficult to find a relatively similar country. The main purpose of surrogate analysis is to find a country whose cost structure bears a close resemblance to the cost structure that would prevail in the nonmarket country if it suddenly embraced a market philosophy. The main item in any country's cost structure is the wage level. There is, fortunately, a close connection between wage rates and GNP per capita.

Wage rates are the most important cost component in the manufacturing sector and are reflected both in direct costs and the costs of many purchased inputs. The connection between per capita GNP and annual wage rates is documented in Table 1 and Diagram 1. The simple correlation between per capita GNP and the wage rate is 0.91. Thus, if a surrogate country is chosen with approximately the same per capita GNP as the nonmarket country, the Department of Commerce can be reasonably certain that wage rates in the surrogate country will indicate what wage rates in the nonmarket country would be under a more market-oriented system. This is exactly the purpose of surrogate country analysis.

Another objection to the use of constructed value is that prices for some inputs (especially exotic materials) may not be available in the surrogate country—either because the input is not used in that country or because the sellers and buyers of the input will not disclose its price. The solution to this difficulty seems straightforward: the Department of Commerce should base its price estimate on data from some other country, giving first preference to similar countries.

Table 1

Earnings in Manufacturing Industry, 1978

Rank a/	Country b/	Annual per capita GNP, U.S. dollars c/	Work time unit d/	Earnings per time unit, local currency e/	Currency unit	Exchange rate per U.S. dollars f/	Annual earnings, U.S. dollars g/
1	Korea	1160	month	92907	won	404	2300
2	Mexico	1290	month	6474	peso	22.767	3410
3	Chile	1410	month	3886	peso	31.656	1470
4	Hong Kong	3040	day	33.79	dollar	4.64	2180
5	Greece	3250	hour	66.74	drachma	36.745	3890
6	Singapore	3290	hour	1.71	dollar	2.274	1920
7	Ireland	3470	week	72.82	pound	0.521	7270
8	Israel	3500	month	6756	pound	17.47	4640
9	Italy	3850	hour	3106	lire	848.66	7330
10	United Kingdom	5030	week	74.62	pound	0.521	7450
11	German Democratic Republic	5710	month	973	mark	4.20	2780
12	Finland	6820	hour	15.69	markkaa	4.117	7630
13	Austria	7030	month	10942	schilling	14.522	9040
14	Japan	7280	month	214575	yen	210.47	12290
15	France	8260	hour	17.49	franc	4.513	8260
16	Netherlands	8410	hour	12.44	guilder	2.163	12290
17	Belgium	9090	hour	184.44	franc	31.41	10750
18	Canada	9180	week	265.03	dollar	1.141	12080
19	Federal Republic of Germany	9580	week	408	mark	2.009	12630
20	United States	9590	week	249.27	dollar	1.000	12960
21	Denmark	9920	hour	44.59	kroner	5.515	13880
22	Sweden	10210	hour	32.31	kroner	4.519	11330
23	Switzerland	12100	hour	11.06	franc	1.788	14280

Notes and sources

(a) Based on 1978 per capita GNP, as estimated by the World Bank.

(b) Countries listed are those with some degree of industrialization for which manufacturing earnings were reported for 1978 by the International Labour Office.

(c) World Bank, World Development Report, 1980, Table 1.

(d) Time unit for which 1978 manufacturing earnings are reported in International Labour Office, Year Book of Labour Statistics, 1979, Table 18. The following conversion factors were used to convert the reported earnings into annual earnings:

12 months equal 1 year
52 weeks equal 1 year
300 days equal 1 year
Number of working hours per week, as reported in Table 13:

Notes and sources for Table 1 (continued)

Greece	41.2
Singapore	49.0
Italy	7.70 hours per day in 1977; assumed to equal 38.5 hours per week
Finland	38.5
France	41.0
Netherlands	41.1
Belgium	35.2
Denmark	33.0
Sweden	132 hours per month in 1977
Switzerland	44.4

(e) As reported by the International Labour Office for 1978 for the weighted average of male and female manufacturing workers. Earnings include fringe benefits, shift differentials, and overtime. In the case of Italy, the latest reported figure was for 1977 earnings; this figure, 2673 lire per hour, was growthed-up by the index of hourly wage rates, which increased from 373.5 in 1977 to 434.0 in 1978, to obtain an estimate for 1978 of 3106 lire per hour. In the case of the United Kingdom, a weighted average of male and female earnings was not reported. Accordingly, the earnings figures for each sex were weighted by the reported manufacturing labor composition in Table 2 of the Year Book, namely 70.8% male and 29.2% female.

(f) Local currency units per U.S. dollar, average of month-end market rates, as reported in line rf of the International Monetary Fund, International Financial Statistics Yearbook, 1980, 1980. In the case of the German Democratic Republic, the rate of 4.20 marks per U.S. dollar is the same rate used by the World Bank for its base year (1970) estimate of GDR per capita GNP. Note, however, that Pick's World Currency Yearbook, 1980 reports a June 1978 rate for the East German mark of 8.55 per U.S. dollar.

(g) Calculated as:

(Earnings per time unit expressed in local currency) divided by
(Number of local currency units per U.S. dollar) multiplied by
(Appropriate number of time units per year).

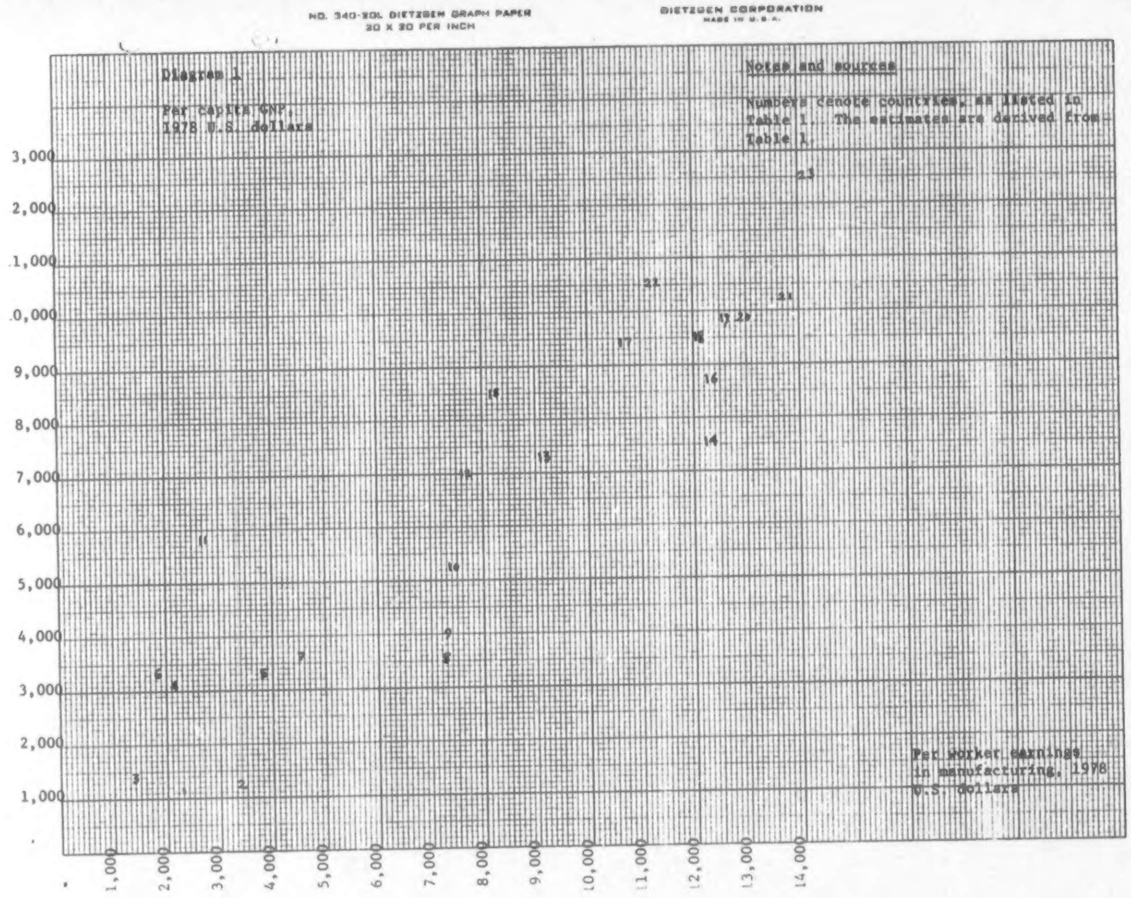
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Diagram 1
Per capita GNP,
1978 U.S. dollars
Notes and sources
Numbers denote countries, as listed in Table 1. The estimates are derived from Table 1.
Per worker earnings
in manufacturing, 1978
U.S. dollars
3,000
2,000
1,000
0,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
1,000
2,000
3,000
4,000
5,000
6,000
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It is worth noting that the GAO endorses a constructed value approach in all nonmarket economy antidumping cases.[1] The GAO report notes the following advantage of the constructed value method (p. 23):

It fairly permits a nonmarket economy producer to attempt to show it has economic efficiencies.

It reflects the actual production factors used by the nonmarket producer.

It provides costs that can be valued in U.S. dollars.

It reduces the administrative problems associated with gaining the cooperation of surrogate producers and making the necessary adjustments for differences in production techniques and scale of operation.

Simplification steps

We recommend that the Department of Commerce take the following steps to mitigate the administrative burden associated with the constructed value approach:

Publish a list of preferred surrogate countries matched to nonmarket countries. A published list will minimize much of the time-consuming debate that now surrounds the selection of the surrogate country in each case.

Early in the investigation, identify and disclose the physical factors that need to be valued in the surrogate country (except for those physical factors which cannot be identified for legitimate business secrecy reasons).

Place the burden squarely on the petitioner and the respondent to produce evidence on unit costs for those physical factors in the surrogate country. In other words, the Department of Commerce would, for the most part, merely assess the unit cost data; it would not also collect the unit cost data.

Publish regulations on cost allocation methods for investigations involving merchandise produced as a co-product or by-product.

Finally, we feel that the Subcommittee should provide legislative direction so that the Commerce Department can, in some cases, use home market and export prices of nonmarket countries to establish foreign market value. This merely requires the progressive designation of erstwhile nonmarket countries (such as Yugoslavia) as market countries for the purposes of the antidumping law, and the estimation of appropriate exchange rates for those countries. These are not such formidable tasks. Scholars regularly report on the intrusion of market forces into state-controlled economies. The CIA implicitly estimates exchange rates for nonmarket countries. A joint study of the United Nations, the World Bank and the University of Pennsylvania, led by Professor Irving Kravis, has valued various national currencies, including those of some nonmarket countries, by the use of a purchasing power analysis. The Commerce Department could draw on all these sources in its efforts to harmonize the application of the antidumping laws to both market and nonmarket economies.

In short, the Subcommittee might well direct its legislative efforts both toward procedural reform of the constructed value approach and toward the progressive harmonization of the analytic methods applied to market and nonmarket economies. In the meantime, legislative initiatives should not torpedo the evolution of a system that is designed to preserve competitive advantage.

TUNA RESEARCH FOUNDATION, INC.,
Washington, D.C., April 13, 1983.

Mr. JOHN J. SALMON,
Chief Counsel, Committee on Ways and Means,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. SALMON: On behalf of our members, United States processors of tuna, we would like to congratulate and thank the Subcommittee on Trade for holding hearings on options to improve the Nation's trade remedy laws. We share the Subcommittee's concerns that laws must be successful in counteracting foreign unfair trade practices. We agree that the international dispute settlement procedures should operate more effectively to remove these unfair trade practices.

Foreign competition has long posed a real threat to all United States fishing industries—and particularly to our tuna industry, which contributes approximately 20 percent of the U.S. food fish industry by volume and value. As processed tuna has few other markets than the United States, the U.S. tuna industry is obviously sensitive to any increase in foreign imports.

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[1] "U.S. Laws and Regulations Applicable to Imports From Nonmarket Economies Could Be Improved" (ID-81-35).

Foreign imports have grown steadily. In 1980, 63.5 million pounds of tuna were imported into the U.S. In 1981, there was an increase to 71 million pounds. This represented a total of 3.5 million cases of imported canned tuna products which was a 12 percent share of our domestic market. Imports entered against the quota for 1982 totaled over 87 million pounds. In August the quota was reached, and imported canned tuna products took over 20 percent of our domestic market.

A further problem is the fact that foreign-produced canned tuna is not packed under the same quality and safety standards as our own domestic products. As you well know, the U.S. tuna industry is one of the most heavily regulated industries in this country—from marine environment protection laws, fair and safe employment standards to food and consumer safety and protection laws. The U.S. tuna canners maintain one of the highest standards for food safety, quality and working conditions. Foreign products in our marketplace are not regulated with the same standards for quality and safety. Nor do foreign producers maintain comparable safe and equitable working conditions. Many do not meet our fair labor standard laws, OSHA, and other costly U.S. regulations concerning worker safety, health and welfare. Not only is it cheap labor, but the importers are competing at unfair advantages. Importers of foreign-processed tuna have taken advantage of the tuna industry's economic crisis and have accelerated their importation of tuna products into the U.S. market, thereby aggravating the financial plight of tuna canners. There is evidence in the marketplace that some importers are undercutting the domestic price structure.

In a recent article, Thailand has announced its intention to export more canned tuna as a result of passage of H.R. 4566 whereby the pack of tuna from American Samoa was discounted as import, thus allowing an additional flow of some 1.5 million cases of foreign product into our markets.

Further, the Tuna Research Foundation, on behalf of the domestic tuna processors, filed on March 7 a petition under the countervailing duty laws as amended by the Trade Agreements Act of 1979 against Philippine imports. We are actively utilizing available trade remedies in an all-out effort to preserve our domestic trade.

We fully support the Subcommittee's actions in investigating remedies to the trade laws of the U.S. and urge a course of action that will protect and preserve our vital domestic industries.

Thank you for this opportunity to express our views.

Respectfully yours,

JOHN P. MULLIGAN, *President.*

STATEMENT OF DAVID J. STEINBERG, PRESIDENT, U.S. COUNCIL FOR AN OPEN WORLD ECONOMY, INC.

(The U.S. Council for an Open World Economy is a private, nonprofit organization engaged in research and public education on the merits and problems of developing an open international economic system in the total national interest. The Council does not act on behalf of any private interest.)

Summary

This testimony, limited to reform of the import-relief provisions of the Trade Act of 1974, proposes that any import restrictions deemed justifiable to aid an industry seriously injured or threatened by import competition should be only one component of a coherent redevelopment strategy addressing the real problems and needs of that industry. Such a strategy should include, not only governmental measures to facilitate the adjustment process, but also commitments by management and labor aimed at ensuring that the import-control subsidy is used in a manner that best serves the public interest as well as the enlightened self-interest of the industry itself.*

The "import-relief" provisions of the trade legislation—the so-called "escape clause"—have been on the statute books for about 35 years. Various changes have been made during that period in the criteria for import restriction and in the instrumentalities of trade restraint. Adjustment assistance to individual firms, workers and communities has been added as an alternative or supplement to import control (which provides a subsidy to the entire industry). However, the "escape clause" in U.S. trade legislation has needed much more than tidying-up the injury criteria, the modes of import relief and the operation of the adjustment-assistance program. It needs to be made the instrument for an "industrial policy" addressing the totality of the industry's problems and needs—a coherent stategy to help the industry achieve viability in an open, increasingly competitive world economy (if such viability is possible at all).

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*See also addendum concerning national-security clause.

To restrict imports or not to restrict imports, and if restricted then how—these are the questions, the only questions, which government considers in deciding whether and how to provide aid to a petitioning industry on an industry-wide basis. Neglect of other areas of investigation and assistance (aside from adjustment assistance as currently defined) could deny aid the industry may seriously need if successful adjustment to new international realities is to be ensured (and possibility if adjustment assistance to individual firms is to be effective). Nor are firm commitments required from the companies and workers involved as a condition for government subsidy at public expense. Neither the U.S. government (excepting, in some measure, the General Accounting Office) nor (to my knowledge) anyone outside the government (except for my pioneering efforts in this regard) is proposing reforms along these lines. Nor is anything along these lines being proposed elsewhere in the international community; whatever attention is being given by the U.S. Government, any other government or the GATT secretariat to reforming the "safeguard" mechanism of the General Agreement on Tariffs and Trade falls far short of what needs to be done.

The reform I have advocated for many years in Congressional testimony and elsewhere would tend to reduce protectionism by limiting import restriction to those situations where (1) the real problems and needs of ailing industries have been carfully diagnosed in their entirety and the entire range of remedial measures has been carefully considered, (2) the assistance considered by government covers, not just import restraint, or adjustment assistance as currently defined, but the whole range of remedial measures appropriate to government's role in the adjustment process (thus possibly avoiding or at least reducing recourse to import restriction), (3) the industry itself (management and labor) makes suitable commitments for which it will be held strictly accountable, and (4) the particular industry-redevelopment program (possibly involving restructuring the industry) is reviewed annually by the Executive Branch, the Congress and the International Trade Commission to ensure that the government and the industry are doing all that they have undertaken to do, and to determine what more may need to be done to ensure success of the program in the overall public interest.

Aside from possible import restraint, government measures deserving consideration include tax assistance and anti-trust relief. Government should determine the extent to which statutory and regulatory measures of any kind unfairly impede the industry's ability to adjust successfully to unrestricted foreign competition. Any inequities should be corrected as part of a coherent industry-adjustment strategy. Trade restrictions outside the framework of coherent industry-redevelopment strategies (as all trade restrictions have been) tend to divert attention from the full range of things that ought to be done to solve the problems that inspired the quests for import control.

Pig in a poke

Import controls should not be imposed in some vague hope that the industry will use this adjustment time for soundly based adjustment efforts. Clear delineation of the industry's adjustment plans, with full public accountability, should be a condition—a required framework—for whatever import restriction is provided. Thus, the nation that provides help to a deserving industry should insist on positive commitments from that industry concerning how it will use that assistance, not be satisfied with a passive expectation that the help provided at public expense will be used productively for the public good. Import control to buy adjustment time should be a measure of last resort, be as little as possible and be terminated as soon as possible. Casting import control within the framework of a comprehensive adjustment (indeed redevelopment) strategy for the affected industry would help keep import control to these standards, and do it more effectively than the import-relief policy under which we have operated to date.

In short, the time has come to reform the sort of "pig in a poke" approach that for too long has characterized recourse to import restriction, both within and outside the import-relief provisions of the trade legislation. Such a description of current practice is appropriate in the sense that what is supposed to be a program of assistance to an industry seriously injured (or seriously threatened) by foreign competition is not a coherent, conspicuous package of measures reflecting thorough examination of the real problems and needs of the particular industry and projecting the best efforts of government and the industry itself to deal effectively and responsibly with the industry's ordeal. Nor is the cost of the government's assistance made known to the public, or even known by anyone. If import controls are to be impose by whatever means (including international negotiation), the American people have a right to know for what clearly defined purpose these subsidies are required, what all the parties involved are contributing to the stated objective, and what these import controls (and any other forms of government assistance) cost the American people as consumers and taxpayers.

Presidential initiative lacking

There is much the President (with the help of appropriate executive agencies and the International Trade Commission) can do at the present time, on his own initiative, along the lines of making import controls (if needed at all) just one part of a coherent redevelopment strategy for the industry deserving such assistance. Even where it is determined that import restriction should not be provided, it is conceivable the industry in question may merit other forms of government help over and above adjustment assistance to individual firms and workers—for example, correction of statutory or regulatory inequities found to be impairing the industry's adjustment capability. To proceed in the most enlightened, responsible manner in response to the industry's problems and needs, the President requires the best analysis possible of the situation and of the options at his disposal.

Unfortunately, the President does not get and does not seek this range and quality of assessment and advice from the executive departments and from the International Trade Commission. The Commission's role is of particular importance in this regard, not only because the trade legislation assigns the Commission the function of assessing a petitioning industry's request for relief against imports, but because the Commission's investigations of these industries are the most thorough in government—at times the "only show in town" regarding studies of these sectors of our economy. Even within the trade legislation as now written, there is much more the ITC can and should do to produce information and insights the President could find useful in deciding the correct course of action concerning government response to a petitioning industry's problems—even if the Commission did not find serious injury (or threat thereof) from imports.

Section 201(b)5 of the Trade Act of 1974 (a provision whose full scope has been neglected in trade-policy administration) requires assessment of the petitioning industry's effort to adjust to import competition. By implication, this calls for (at least invites) assessment of government policies materially affecting the industry's ability to adjust, and correction of any statutory or regulatory inequities found to be impairing such adjustment. Such action is an essential component of balanced adjustment assistence to a deserving industry, whether or not import restriction is also provided. The ITC has substantially neglected the scope and potential of 201(b)5. The Executive Branch has totally overlooked it.

Although much can be done within the current legislation and the inherent powers of the President toward the reform I have advocated, these changes in trade-policy administration should be mandated by statute. They should not be left to the initiatives of the ITC and the President, neither of whom seems ready for such innovation on their own.

The national-security clause

I have for many years sought reform of the national-security clause of the trade legislation along the lines I have advocated for reform of the import-relief section. It has been a lonely effort in which no one outside this Council, in or out of government, seems interested. If a national-security clause is justifiable at all in the trade legislation (I think it is), it ought to be a sensible provision ensuring effective attention to national-security needs. This issue has been neglected through the government, and virtually everywhere else, for the nearly 30 years that a national-security clause has adorned our trade legislation.

When the President finds that imports of a product threaten the mobilization base with respect to that product, the only remedial action mandated by Congress is restriction of those imports—no matter the advisability of other remedial measures, not only to guarantee repair of that sector of the mobilization base, but also to limit the degree and duration of any import control, which affects other areas of the national interest and ought to be as small and as short as possible (if needed at all). The national-security clause makes no reference to the need to take all appropriate measures (not limited to trade policy alone) to make certain that the particular sector of the mobilization base is protected and strengthened. Nor has Congress devised procedures for systematic review of government assistance in such cases and of the progress made toward achieving the objective of such help. It has not insisted on a plan by the industry itself—in fact, a joint industry-government strategy, with appropriate accountability to the American people, to ensure that the particular sector of the mobilization base is being protected and strengthened and that the total national interest is advanced by whatever government assistance is provided. None of these things; just get those imports restricted.

The result is another example of pig-in-a-poke largesse, at public expense, to an industry successful in generating government help. Even if the objective of the government aid cannot, on national-security grounds, be revealed in detail, the least we should expect is the government's assurance that a coherent plan has been devised to make secure this sector of the mobilization base. No such plan is required under current law. In fact, as with import restriction under the import-relief provisions of the trade legislation, recourse to import control under the national-security clause as now written—the only remedial action mandated by Congress—tends to divert attention from other measures that merit consideration in addressing the real problems and needs of the affected industry. The result, ironically, is that the national-security clause may, in a sense, be a threat to national security.

The one instance in which the national-security clause has been used as a basis for restriction of imports proves the point I have made. Quotas were imposed on petroleum imports in the late 1950's, but not as an integral part of a coherent, comprehensive strategy to strengthen the petroleum sector of our mobilization base. Nor was there systematic Congressional review of these import controls to see if their supposed purpose was being realized. The nation went its merry way with oil import quotas and an assortment of other subsidies that has sporadically been given the oil industry over a long span of years (for example, the oil depletion allowance). A properly devised national-security clause, along the lines I have suggested, might have prevented—it would at least have alleviated—the national-security crisis we encountered in petroleum supply in the 1970's and still have not solved.

Just as there are opportunities for Presidential initiative in correcting the inadequacies of the import-relief provisions without new legislation, there is much the President can do on his own to correct the shortcomings of the national-security clause. However, the White House has never shown inclinations toward such initiatives. Legislative reform, desirable in any event, seems the only way to correct the failings of the trade legislation in the matters I have discussed in this testimony.

VULCAN FOUNDRY, INC.,
Denham Springs, La., March 14, 1983.

Re hearing, trade remedy laws

Hon. SAM M. GIBBONS,
Longworth House Office Building,
Washington, D.C.

DEAR REP. GIBBONS: The foundry industry, of which we are part, consists of thousands of small producers with an average of less than 100 employees. Our resources to fight unfair trade are limited, thus foreign competitors have found it's easy to get a foothold in our home markets by using subsidies and price cutting.

In the past three years we have helped finance two successful trade cases in which countervailing duty was ordered against competitors in India and Mexico. The total legal fee for this was $124,000—or $62,000 per case including the necessary followup work. This illustrates several points which I hope you will keep in mind in the review of trade remedy laws:

1. The laws work; the federal government does make legal remedies available to U.S. firms hurt by unfair trade practices.

2. It is expensive. Our cost of $62,000 is probably average for a trade case. It would help if the laws were not limited to country and product pairs. For example, subsidies in India are somewhat standard for all metal products. Yet it takes a seaprate case to defend against subsidies for iron pipe, construction castings, meter boxes, counterweights, etc. Each product involves a separate $62,000 court battle. It would cost millions to carry it thru.

3. This high cost denies protection to American producers. It also works to the advantage of the foreign competition, since the lawsuit costs them nothing (the defense is paid for by the foreign government).

4. Although the federal government offers help for American firms there are a number of other obstacles. We are denied the right to cross examine foreign testimony, which means the Trade Commission and Commerce Department are forced to accept the claims of foreign governments as truthful. If a foreign government pre-

sents new information (which does not have to be verified) the Commerce Department will reverse an earlier duty award (as happened in our India case). This can be done without holding a hearing or even notifying the U.S. firms. Even worse, the duty is sometimes not even collected (we have documented proof, but U.S. Customs says it does not have enough people to enforce the regulations).

When the these obstacles are taken together, it is not surprising that so few trade cases are heard. One may safely predict the drain of American jobs and dollars will continue unless the Congress takes steps to make the process work the way it should work. Obviously the first step is for Congress to require the federal government to enforce its own regulations—such as refusing entry for foreign products which fail to carry required origin markings.

Sincerely yours,

William F. Burke, *Assistant to president.*

Statement of Pierre F. de Ravel d'Esclapon, Windels, Marx, Davies & Ives

Mr. Chairman, Members of the Committee: I am Pierre F. de Ravel d'Esclapon, a Partner in the Washington and New York law firm of Windels, Marx, Davies & Ives. While we represent a variety of foreign clients in trade proceedings, the views expressed here are our own and not necessarily those of our clients.

We will focus our statement on the following points:

1. The need to perserve the sanctity of confidential information.
2. The need to examine carefully the potential implications of any changes to the definition of "subsidy" in the Trade Agreements Act; and
3. The need to be mindful of the burdens imposed on foreign respondents in trade cases.

Issue No. 1: The Sanctity of Confidential Information

Mr. Horlick of the International Trade Administration of the Department of Commerce has proposed to the Subcommittee that the law be amended to allow interested parties at the beginning of a dumping or countervailing duty proceeding to file a standing request for access to confidential information under protective orders. Other witnesses have further recommended that the law be amended to provide for a petitioner's active participation and presence during the verification process.

We think that those proposed amendments, if passed, would result in a radical change in the fundamental nature of these proceedings. In its present form Section 777 of the Act (19 U.S.C. § 1677f) reflects the long standing congressional intent of delegating to the Department of Commerce the task of investigating whether dumping or subsidization exists. That the proper role of the Commerce Department in these cases is an investigatory one and not an adjudicatory one is beyond dispute. To the end, § 777 first sets out the general principle of sanctity of the confidential information submitted to the Commerce Department in the fulfillment of its investigatory role. The statute then carves out a limited exception for disclosure under protective order provided that two stringent conditions are met: the party requesting the information must describe "with particularity" the information it seeks, thus precluding undifferentiated, "blanket" requests for disclosure, and must set forth the reasons for the request. The Department of Commerce Regulations implementing that provision of the statute interpret it as requiring a showing of "good cause" for obtaining the particular information sought and a determination by the Secretary that the need of the requesting person to have access to the information outweighs the need of the person submitting it to preserve its confidentiality. (19 C.F.R. § 353.30(a)).

The information in question, as the Subcommittee is surely aware, is information of a highly sensitive nature, often including complete and detailed cost of production breakdowns, customer names, sources of supplies and the like. Furthermore, that confidential information relates to the very recent past, usually to commercial events during the preceding six months or one year: it is not stale commercial information of the sort often involved in discovery in commercial litigation. Last, but not least, such information is rarely supplied even to the respondent's own government.

Given the extreme sensitivity of the information involved, it is not surprising that the Court of International Trade has viewed the statutory provision requiring a particularized request supported by reasons for disclosure with the "utmost seriousness" and characterized it as "among the most delicate and important provisions in the statute and [one which] touches on some of the most sensitive decisions that have to be made in the administrative process." *Sacilor, Acieres et Laminoirs de Lorraine* v. *United States*, 542 F. Supp. 1020, 1024 (Ct. Int'l Trade 1982).

In our experience, our clients have been willing to disclose that kind of confidential information to the Department of Commerce only after being assured that such information would be disclosed only if the stringent requirements of the statute and regulations were met, and then only pursuant to a protective order designed to prevent access by competitors.

Despite the concern evidenced by the Court of International Trade and foreign respondents, in a number of recent preceedings the statute and regulations have been granted mere lip service by the Department of Commerce. Disclosure of confidential information has been granted based on requests which made little or no effort to define the information sought with particularity, which did nothing more than describe in general stock phrases the requestor's need for access to classes of information and data, and which failed to show why the information found in the required non-confidential summaries supplied by respondents was sufficient.

In our experience, the most common reasons given to support requests for confidential information are that it is "needed" so that petitioners can verify its accuracy and provide analysis and argument to the Department of Commerce. In our judgment, such "reasons" could be put forward in any case by any petitioner. By recommending that confidential information be routinely disclosed on the basis of standing requests of that nature, the Department is attempting to abdicate its responsibility to determine whether in each case the petitioner's need for particular items of information outweighs the respondent's need for continued confidentiality.

The suggested change, however, is more than a procedural shortcut. It implies a fundamental change in the Department's role. By recommending that it be allowed routinely to grant access to confidential information, the Commerce Department is essentially seeking to abdicate its investigatory role. It would shift the burden of determining relevance and verifying and analyzing information to the parties to an investigation and set itself up as a mere adjudicator of disputed facts. Whether such a change is grounded on a lack of adequately trained personnel or other reasons, it cannot be consonant with the long-standing congressional intent underlying the Trade Agreements Act. As the Court in *Sacilor* recognized, the decision whether to release confidential information pursuant to a protective order, "should not confuse the role and need of a party to an administrative investigation with that of a litigant in a court of law and it should not reflect an abdication of this investigative duties of the agency."

The same confusion between the rules of litigants in a private litigation and of interested parties in trade proceedings is evident in the proposal made to the Subcommittee by one witness to allow participation of domestic interested parties in the verification process. There is no question that, consistent with the statutory scheme, parties should have full access to the methods and methodologies used by respondents and by the Commerce Department and an opportunity to comment. However, to allow the representatives of interested parties, competitors of the respondent, to sit in during verification of confidential information assumes that the Department is incapable of performing the investigatory role delegated to it by Congress. Unless the Subcommittee is prepared to make that assumption, which would be tantamount to treating the present system of administration as a failure, that suggestion should be discarded.

Issue No. 2: The Definition of Subsidies

One witness has called for an expansion of the definition of subsidies at § 771 of the Act (19 U.S.C. § 1677(5)) by including so-called downstream subsidies. The suggestion does not call for a procedural improvement, but rather a fundamental substantive change with enormous scope and unpredictable consequences.

It should first be pointed out that the Department of Commerce has not adopted any rule or definition to the effect that a downstream subsidy cannot be the subject of a countervailing duty in a proper case. Rather, on a case-by-case basis it has applied its expertise to examination of the economic realities found to exist. In the majority of cases to date it has concluded that alleged downstream subsidies did not confer an economic benefit on the foreign manufacturer and should not be countervailed.

A statutory amendment that would require a downstream subsidy to be countervailed in every case, regardless of its nature, purpose or economic effect, could produce bizarre and unintended results. For example, a large amount of French hot rolled steel sheet sold in this country is produced from coal purchased in West Virginia. That coal has benefited from a variety of subsidies ranging from social and health schemes applicable to coal miners to transportation by federally subsidized railroads and subsidized U.S. flag vessels. Under the proposed definition of "subsidy", it is conceivable that the Department would be forced to take into account such subsidies granted by the United States government. The example is not far-fetched. In recent proceedings petitioners contended that French steel products should be penalized in the amount of subsidies allegedly granted by the West German government to coal producers in that country.

We submit that a "per se" rule of the sort proposed should be adopted by statute, if at all, only in the rare situation where there is virtual consensus of expert opinion that in every case the practice confers an economic benefit to foreign producers that is likely to result in material injury to a domestic industry. Given the great variety of actual practices and effects which may be found, we think it would be exceedingly difficult to expand the definition of subsidy without causing unintended results. Certainly such a change should not be undertaken without the most thorough and expert review and analysis. Rather, we suggest that the practice developed by the Commerce Department in the application of its discretion is sufficient to cope with particular practices as they arise in a manner consistent with the congressional intent.

Issue No. 3: Burdens Imposed on Foreign Respondents

If the United States trade laws are to retain credibility, that is to say if they are to be regarded as a system for enforcing fair trade practices rather than outright protectionism, it is essential that they retian a substantially even balance between the competing parties. We submit that to a degree existing procedures are already stacked against the foreign respondent. The Subcommittee must be extremely cautious to ensure that it does not, in the guise of simplification, cost reduction or efficiency, so alter the balance as to make it impossible for a foreign respondent to succeed even against a weak or frivolous petition.

Complaints have been heard from representatives of domestic industries concerning the high cost of preparing and presenting antidumping and countervailing duty petitions. It must be borne in mind, however, that in many, if not most cases, the costs of defending against such petitions are likely to exceed those of petitioning.

Most foreign respondents are faced with the immediate problem that they do not conduct business in English and must bear the extra cost of translating data and communications with U.S. counsel and consultants. More important, few if any foreign companies maintain their business records and data in the forms desired by the Department of Commerce for comparison and analysis. In a recent proceeding, despite a substantial expenditure by our client to provide a large quantity of sales data to the Department as requested, the Department rejected the entire submission because one item of data of marginal significance was not included and relied for its preliminary determination on information supplied by the domestic industry. To complete and reconfigure the data in a form acceptable to the Department in time for verification and consideration before its final determination required the full-time work of some twelve individuals for fourteen days The final determination was substantially more favorable to our client. But the result, a fair one based upon verificable fact, could not have been reached without the enormous expense and effort described.

It should also be borne in mind that a domestic producer or industry can devote months or even years to compilation and analysis of data before filing a petition. Once it is filed, however, foreign respondents have extremely limited time periods within which to react. They must obtain copies of the petition, retain counsel and experts, respond to extensive questionnaires, furnish compiled data, and the like within a matter of weeks. If the foreign industry consists of small, scattered producers, substantial time is required simply to organize the effort. In addition, such respondents rarely have easy access to data on their own country's total production and exports or U.S. market conditions and import levels and must seek such data at the same they are attempting to compile quantities of information on their own sales, cost of production, profitability and the like. The time constraints under which such work must be performed invariably make it more expensive and disruptive than it would be without the pressure of successive deadlines.

Finally, as other witnesses have stated, the mere filing of a petition, even if weak or frivolous, often serves to create sufficient uncertainty to cause the respondent to suspend exports to the United States thus depriving it of income to support a defense. In the case of a small respondent, the cost of defense may preclude any active opposition. The petition may succeed by default, even if lacking in merit, depriving U.S. consumers of a potential bargain and disrupting commercial relationships.

We respectfully submit, therefore, that all proposed "procedural improvements" must be subjected to strict scrutiny to determine whether they are likely to reduce the burdens on all parties to a proceeding—the domestic industry, the administering authorities and the foreign respondents. Any change which would alleviate the burden of either the petitioner or the government but impose greater costs on the other parties cannot be regarded as an improvement in the fair and efficient administration of the law.

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